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No. 103 and No. 327

Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1924

ALPHA PORTLAND CEMENT COMPANY
Plaintiff-in-Error

against

COMMONWEALTH OF MASSACHUSETTS
Defendant-in-Error

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MASSACHUSETTS

BRIEF AND ARGUMENT FOR PLAINTIFF-IN-ERROR

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IN THE

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October Term, A. D., 1924.

No. 103 and No. 327

ALPHA PORTLAND CEMENT COMPANY,
Plaintiff-in-error,

against

COMMONWEALTH OF MASSACHUSETTS,
Defendant-in-error.

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MASSACHUSETTS.

Statement of the Case.

CASE NO. 103.

This is a writ of error to review a final judgment of the Supreme Judicial Court of the State of Massachusetts finally dismissing the plaintiff's petition, and awarding a judgment with costs against it.

The action was brought for the abatement and recovery of a tax assessed for the year 1921 under the Massachusetts Corporation Tax Law, General Laws, Chapter 63 as amended by Chapter 493 of the Statutes of 1921, on the ground that the tax was illegally assessed, and that the statute construed as applicable to the plaintiff was repugnant to the Federal Constitution.

The plaintiff paid the tax under protest; and in due time brought this proceeding under Section 77 of Chapter 63, of the General Laws, for the recovery of the tax so paid. There is no technical question of practice involved. The sole question is whether or not the Statute

construed as applicable to the plaintiff is unconstitutional.

The Massachusetts statute here in question was originally passed as General Acts of 1919, Part I, Chapter 355. It was amended by Acts of 1920, Chapters 415 and 549. As thus amended it was incorporated in the revision of 1921 and is now known as G. L., Chap. 63, Secs. 30, *et seq.* The portions of the Statute considered relevant by the State Court are printed in the record as an appendix to the opinion of the State Court (Record, of case 103, pp. 31-40). The portions of the Act applicable to this case, excluding administrative provisions, are printed in the margin.* This Act took the place of the

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*"Section 39. Every foreign corporation shall pay annually with respect to the carrying on or doing of business by it within the commonwealth, an excise equal to the sum of the following, provided that every such corporation shall pay annually a total excise not less in amount than one-twentieth of one per cent of such proportion of the fair cash value of all the shares constituting its capital stock as the assets, both real and personal, employed in any business within the commonwealth on April first following the close of the taxable year, bear to the total assets of the corporation employed in business on said date:

"(1) An amount equal to five dollars per thousand upon the value of the corporate excess employed by it within the commonwealth.

"(2) An amount equal to two and one half per cent of that part of its net income, as defined in section thirty and in this section, which is derived from business carried on within the commonwealth."

* * * * * * * * * *

Section 30, sub-div. 4. "'Corporate excess employed within the commonwealth' by a foreign corporation, such proportion of the fair value of all the shares constituting the capital stock on the first day of April when the return called for by section thirty-five is due as the value of the assets, both real and personal, employed in any business within the commonwealth on that date, bears to the value of the total assets of the corporation on said date, less the value of the following:" (the exceptions are not applicable to this case).

"Section 41. The commissioner shall determine in the manner provided in this section the part of the net income of a foreign corporation derived from business carried on within the commonwealth.

"The following classes of income shall be allocated as follows:

(Subdivisions (a), (b), and (c) cover a specific allocation of gains from the sale of capital assets and from interest received in Massachusetts, which are not applicable to this case.)

"Income of the foregoing classes having thus been allocated, the remainder of the net income as defined in section thirty shall be allocated as follows:

"If a foreign business corporation carries on no business outside this commonwealth, the whole of said remainder shall be allocated to this commonwealth.

1909 Act as amended considered in *Cheney Bros.* v. *Mass.*, 246 U. S., 147. Relevant portions of the 1909 Act are printed for reference as an appendix hereto.

The action was brought for the recovery of $800.45 paid by the plaintiff to the defendant's Commissioner of Corporations under protest, as an excise tax for the year 1921. This amount was assessed and collected from the plaintiff. The question presented by this writ of error is whether this statute, construed by the State Court to be applicable to the plaintiff, which was expressly found to be engaged solely in interstate commerce, is repugnant to the provisions of the Commerce

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"If a foreign business corporation carries on any business outside this commonwealth, the net income taxable under this chapter shall be determined as provided in section thirty-eight."

The applicable part of Section 38 is as follows:

"2. If the corporation carries on any business outside the commonwealth, the said remainder shall be divided into three equal parts:

"(a) Of one third, such portion shall be attributed to business carried on within the commonwealth as shall be found by multiplying said third by a fraction whose numerator is the value of the corporation's tangible property situated within the commonwealth and whose denominator is the value of all the corporation's tangible property wherever situated.

"(b) Of another third, such portion shall be attributed to business carried on within the commonwealth as shall be found by multiplying said third by a fraction whose numerator is the expenditure of the corporation for wages, salaries, commissions or other compensation to its employees, and assignable to this commonwealth as hereinafter provided, and whose denominator is the total expenditure of the corporation for wages, salaries, commissions or other compensation to all its employes.

"(c) Of the remaining third, such portion shall be attributed to business carried on within the commonwealth as shall be found by multiplying said third by a fraction whose numerator is the amount of the corporation's gross receipts from business assignable to this commonwealth as hereinafter provided, and whose denominator is the amount of the corporation's gross receipts from all its business.

"3. In a case where only two of the foregoing three rules are applicable, the said remainder of net income of the corporation shall be divided into two equal parts only, each of which shall be apportioned in accordance with one of the remaining two rules. If only one of the three rules is applicable, the part of the net income received from business carried on within the commonwealth shall be determined solely by that rule.

"4. The value of the corporation's tangible property for the purposes of this section shall be the average value of such property during the taxable year.

"5. The amount assignable to this commonwealth of expenditure of the corporation for wages, salaries, commissions or other compensation to its employees shall be such expenditure for the taxable year as represents

Clause and of the XIV Amendment to the Federal Constitution.

The facts are all stipulated, and are briefly as follows:

Plaintiff is a New Jersey corporation, engaged in the manufacture of cement. Its principal business office is located at Easton, Pennsylvania. Its mills are located in the States of New York, Pennsylvania, New Jersey, West Virginia, Ohio, Illinois, and Michigan. Cement manufactured at these mills is shipped therefrom to various points in the United States and foreign countries.

Its only office in Massachusetts is a small one in Boston, in charge of a district sales manager. He and other salesmen, under his direction, solicit orders throughout the New England states. When orders are obtained, they are recorded in the Boston office, and sent to the home office at Easton, Pennsylvania, for acceptance or rejection. No orders are ever accepted at the Boston office. When orders are accepted, the cement is shipped direct to the customer from the mills either in New York

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the compensation of employees not chiefly situated at, connected with or sent out from premises for the transaction of business owned or rented by the corporation outside the commonwealth.

"6. The amount of the corporation's gross receipts from business assignable to this commonwealth shall be the amount of its gross receipts for the taxable year from (a) sales, except those negotiated or effected in behalf of the corporation by agents or agencies chiefly situated at, connected with or sent out from premises for the transaction of business owned or rented by the corporation outside the commonwealth and sales otherwise determined by the commissioner to be attributable to the business conducted on such premises, (b) rentals or royalties from property situated, or from the use of patents, within the commonwealth; provided, that upon application by a corporation which owns or controls substantially all the capital stock of another corporation, or by the corporation so owned or controlled, the commissioner may impose the tax provided for by this chapter upon the income of the two corporations jointly in the same manner as though they were a single corporation, or may, in such other manner as he shall determine, equitably adjust the tax of the applying corporation.

* * * * * * * * *

"9. A rule shall not be deemed to be inapplicable merely because all the tangible property of the expenditure of a corporation for wages, salaries, commissions or other compensation, or the gross receipts of the corporation, are found to be situated, incurred, or received without the commonwealth."

or Pennsylvania. Invoices are mailed direct to the customer from the home office in Easton, Pennsylvania, and payment is made direct by the customers to the Company at Easton, Pennsylvania (Case #103, p. 18).

No merchandise is kept in Massachusetts in sample form, or otherwise. None of the cement is produced or purchased in Massachusetts; all of it, so far as this case is concerned, being manufactured either in New York or Pennsylvania, and shipped from there direct to the customer. No shipment or sales are made from one point in Massachusetts to another point either within or without the State.

It is stipulated that its only property, real or personal, in the State is the office furniture valued at about Five Hundred Dollars. No bank account is kept in the State, salaries and rent being paid directly by checks mailed from Easton, Pennsylvania. No corporate meetings are held, no corporate records are kept in the State. No officers or agents have offices in the State, except the salesmen who travel from the Boston office (Case #103, p. 19).

It was conceded by the State, and expressly found by the State Court that the plaintiff was engaged in Mas-

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Remedies for collection of the tax are provided in Sections 72 to 75 included. Section 72 authorizes collection by distraint, Section 73 authorizes an action on contract and Section 74 makes certain lessees liable for taxes due from lessors. Section 75 is as follows:

> "In addition to the methods provided by Sections seventy-two and seventy-three, taxes under this chapter, except Section sixty-two, maybe collected by an information brought in the Supreme Judicial Court by the attorney general at the relation of the state treasurer. The Court may issue an injunction upon such information, restraining the further prosecution of the business of the company association or corporation until such taxes with interests and costs thereon have been paid; but no telegraph company accepting the provisions of Section fifty-two hundred and sixty-three of the revised statutes of the United States shall be enjoined from constructing, maintaining or operating a telegraph line over and along any of the military or post roads of the United States within this commonwealth."

Section 62 above referred to imposes a gross receipts tax on street railways and is not applicable to this case.

sachusetts exclusively in interstate commerce (Case #103, p. 24). Plaintiff filed a report with the Massachusetts Commissioner of Corporations under protest in the form prescribed by the Department. The report is reproduced in full in the record, and shows in brief the following items:

Issued capital stock.....	Common	15,799,100.00
	Preferred	2,000,000.00
Total gross assets.....		21,076,282.74
Tangible property in Massachusetts, Office furniture only		573.00
Real estate, machinery, merchandise, bank deposits, accounts receivable, patents, good-will, and all other intangible assets, representing the enumeration of all assets employed in business within Massachusetts		None.
Tangible assets employed outside of Massachusetts		12,498,626.06
Intangible assets employed outside of Massachusetts,—		
Bank deposits		121,726.54
Accounts receivable		652,313.31
Good-will		1,750,000.00
Other intangible assets employed outside of Massachusetts		6,053,616.83
(The last figure including an item of $4,500,000., value of stock of the Alpha Portland Cement Co. of Pennsylvania.)		
Securities held in Massachusetts.....		None
Total net income as returned for Federal income tax		$1,247,118.03
For the allocation of income, deducting interest from bonds and notes included in the Federal return, gave net income to be apportioned under the statute of.....		1,148,041.70
Total gross sales		12,774,825.05
Gross sales to Massachusetts customers..		424,982.70

(Case #103, p. 8)

In its return the plaintiff contended that the item of $4,500,000, value of the stock of its subsidiary corporation, should be considered as a tangible asset. Because of the restrictions on foreign corporations' holding real

estate in Pennsylvania, title to the Company's mills in that State is held through the medium of this subsidiary corporation. The parent company operates the mills, and receives all the income therefrom; and since the income was included as part of the total income subject to allocation under the statute, the Company contended that the stock, representing merely the physical property of these mills, should be considered as tangible property outside the State. The State Tax Department overruled this contention, which decision has been upheld by the State Court.

The total salaries paid to the New England salesmen who report to the Boston office are $17,780. The Company contended that if these salaries had any relation to the tax at all, it should be only to the extent of the salaries paid to men selling Massachusetts customers; and the Company therefore contended that the amount of salaries to be used in the statutory computation should be $11,023.60. The State Tax Department also overruled that contention (Case #103, p. 10).

This made slight increases in the amount of tax. The Department assessed the corporate excess of the petitioner at $84,001.21, taxable at five dollars per thousand, making a corporate excess tax of $420.01.

It determined net income assignable to Massachusetts business at $15,370, taxable at two and a half per cent., making a total income tax of $384.25, less five per cent. of the dividends paid to Massachusetts inhabitants, $4.20, making a net income tax of $380.05, and the total amount of tax due of $800.06. This amount was paid under protest, together with an additional nominal tax of 39c on net income imposed under Chapter 493 of the Acts of 1921 (Case #103, p. 14).

The complaint alleged that the tax assessed against the plaintiff was illegal and void, because in contravention of the Commerce Clause, of Section 8 of Article I of the Constitution, and also because it deprived the plaintiff of its property without due process of law in contravention of the XIV Amendment of the Constitu-

tion; and drew in question the validity of the statute under which the tax was imposed upon the ground that construed as applicable to the plaintiff, the statute was unconstitutional for these reasons (Case #103, p. 6).

The State Court found that the plaintiff was engaged solely in interstate commerce, and maintained an office in Massachusetts solely as a means of conducting said commerce. It nevertheless construed the statute to be applicable to the plaintiff, upheld the validity of the statute as so construed, sustained the tax, and dismissed the complaint. While expressly recognizing that the constitutional question involved must finally be passed upon by this Court, it rendered final judgment against the plaintiff (Opinion, Case #103, p. 22).

CASE No. 327.

In case No. 103 the method of assessment whereby corporate excess was valued at $84,001.21, although property in the State was stipulated to be only $573, was not shown. In view of the stipulation that the amount of the tax was not in dispute, there was a doubt whether the State Court had directly construed the statute to require such a valuation of corporate excess.

Case No. 327 was accordingly brought as to the 1922 tax to remove any possible ambiguity as to the State Court's construction of the statute, and, as that Court said in its opinion in the later case, "to make certain the view of this Court as to points thought by the petitioner not to have been fully developed there, in order that the Supreme Court of the United States on writ of review may have before it all aspects of the statute" (Case #327, fol. 94).

Aside from the natural variation of figures between the two years, the essential difference of this case from 103 is (1) a full statement of the method of assessing corporate excess, and (2) instead of the stipulation that the amount of the tax is not in dispute, in this case the stipulation is that the mathematical computations are correct, and the valuation of specific items of assets fair.

Corporate excess was assessed under the general departmental rule that to the value of tangible property in the state should be added such a proportion of the total intangible property of the corporation, as the income assigned to Massachusetts under the statutory formula bore to the total income. The sum of these was assumed to represent assets engaged in business in Massachusetts (Case #327, fols. 31, 32).

The report upon which the tax was assessed showed the following items:

Issued capital stock.....	Common	$15,799,100.00
	Preferred	2,000,000.00
Total gross assets.....		21,406,098.39
Tangible property in Massachusetts, Office furniture only.....		573.00
Real estate, machinery, merchandise, bank deposits, accounts receivable, patents, good-will, and all other intangible assets representing the enumeration of all assets employed in business in Massachusetts		None
Tangible assets employed outside Massachusetts		13,744,008.18
Intangible assets employed outside of Massachusetts:		
Bank deposits		113,642.04
Accounts receivable		713,827.94
Good-will		1,750,000.00
Other intangible assets employed outside Massachusetts		5,084,620.23
(The last figure including an item of $4,500.00, value of stock of Alpha Portland Cement Co. of Pennsylvania.)		
No goods were held in Massachusetts.		
Total net income as returned for Federal income tax		730,159.16
For the allocation of income, deducting interest from bonds and notes included in the Federal return, gave net income to be apportioned under the statute of....		707,577.98
Total gross sales.....		10,717,546.43
Gross sales to Massachusetts customers..		343,204.60

(Case #327, fols. 10-16).

For some reason, unexplained of record, but said to have been inadvertence, the plaintiff's contention that the stock in the Pennsylvania subsidiary should be considered a tangible asset, was followed in assessing that portion of the tax measured by net income. The assessment was made as follows:

(1) The tax measured by net income.

Average value of tangible property in Mass. / Average value of all tangible property		$573. / 16,992,355.22	
	× 1/3	(707,577.99)=	8.02
Wages, salaries, etc. assignable to Mass. / Total wages, salaries, etc.		$11,493.38 / 1,650,614.73	
	× 1/3	(707,577.99)=	1642.29
Gross receipts assignable to Mass. / Gross receipts from all business		$343,204.60 / 10,717,546.43	
	× 1/3	(707,577.99)=	7552.22
Total			9202.53 (Case #327, fol. 24)
Net income $9202.53 taxable at 2½%		$230.06	
Less 5% of dividends paid Massachusetts inhabitants		42.15	
Total income tax (Case #327, fol. 24)			$187.91

(2) The tax on corporate excess.

Income assigned to Massachusetts as above $9,203, divided by total apportionable net income, $707,578, multiplied by total intangible assets, as shown in report and as given above, $7,602,090.21 (inadvertently taken as the total instead of $7,662,090.21) equals $98,827.17, intangible assets assigned to Massachusetts. Adding tangible assets of $573, gave $99,400 as the assessed value of "assets of the petitioner employed in business in Massachusetts."

The cash value of all the shares of the Company's capital stock was determined to be $16,352,162. The assessment of corporate excess was therefore:

$$\frac{99400 \text{ (Value Mass. assets)}}{21,406,098 \text{ (Value total assets)}} \times 16,352,162 = \$75,932.08.$$

(Case #327, fols. 32, 33)

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The tax on corporate excess $5 a thousand, amounted to $379.66.

The legality of this assessment was directly attacked, both upon the ground that it was unconstitutional, and also on the ground that it was not in conformity with the provisions of the statute. In its opinion sustaining the tax and dismissing the complaint, the State Supreme Court said:

> "Without pursuing the details of the method of computation to ascertain these two elements, it is enough to say that it is in conformity to the statute" (Case #327, fol. 95).

This writ of error was therefore brought to review the final judgment of the Supreme Judicial Court of Massachusetts dismissing the complaint. The same questions are involved as in Case No. 103, and need not be repeated here.

Specification of Errors.

CASE NO. 103.

1. The Court erred in holding that the provisions of the Massachusetts excise tax on foreign corporations, as contained in Chapter 63 of the General Laws of the Commonwealth of Massachusetts and the acts in amendment thereof and in addition thereto, and Chapter 361 and Chapter 493 of the Massachusetts Acts of 1921, as applied to the plaintiff-in-error, were constitutional, and not in violation of the provisions of the Commerce Clause contained in Section 8, Article I of the Constitution of the United States, as placing a burden or tax on interstate commerce equivalent to the regulation thereof.

2. The Court erred in holding that the provisions of the said Massachusetts excise tax on foreign corporations, as contained in Chapter 63 of the General Laws of the Commonwealth of Massachusetts, and the

acts in amendment thereof and in addition thereto, and Chapter 361 and Chapter 493 of the Massachusetts Acts of 1921, as applied to the plaintiff-in-error, are constitutional, and not in conflict with and in violation of the provisions of the XIV Amendment to the Constitution of the United States, as depriving the petitioner of its property without due process of law, and denying the petitioner the equal protection of law, in that said statute imposes a tax on income of the business and sales made outside of the said Commonwealth, and upon property located without said Commonwealth (Case #103, pp. 41, 42).

CASE No. 327.

(1) The Massachusetts Supreme Judicial Court erred in holding that the provisions of the Massachusetts Excise Tax on foreign corporations, as contained in Chapter 63 of the General Laws of the Commonwealth of Massachusetts, and the acts in amendment thereof and in addition thereto, and Chapter 361 and Chapter 493 of the Massachusetts Act of 1921, as applied to the plaintiff-in-error were constitutional and not in violation of the provisions of the Commerce Clause contained in Section VIII, Article I of the Constitution of the United States, as placing a burden or tax on interstate commerce equivalent to a regulation thereof.

(2) The Court erred in holding that the provisions of the said Massachusetts Excise Tax on foreign corporations, construed to impose an excise tax upon a foreign corporation engaged exclusively in interstate commerce, for the provilege of maintaining a means of such commerce, and as so construed as applied to the plaintiff-in-error, were constitutional and were not in violation of the provisions of the Commerce Clause contained in Article I, Section VIII of the Constitution of the United States, as placing a burden or tax on interstate commerce equivalent to a regulation thereof.

(3) The Court erred in holding that the provisions of the said Massachusetts Excise Tax on foreign corporations, construed to impose a tax upon a foreign corporation engaged exclusively in interstate commerce, and construed as in substance a tax on credits arising exclusively in said interstate commerce, and as so construed as applied to the plaintiff-in-error, were constitutional and were not in violation of the provisions of the Commerce Clause contained in Article I of Section VIII of the Constitution of the United States, as placing a burden or tax on interstate commerce equivalent to a regulation thereof.

(4) The Court erred in holding that the provisions of the said Massachusetts Excise Tax on foreign corporations, construed to impose a tax upon a foreign corporation engaged exclusively in interstate commerce, and construed to be imposed in part upon income derived exclusively from interstate commerce, and as so construed as applied to the plaintiff-in-error, were constitutional and were not in violation of the provisions of the Commerce Clause contained in Article I, Section VIII of the Constitution of the United States, as placing a burden or tax on interstate commerce equivalent to a regulation thereof.

(5) The Court erred in holding that the provisions of the said Massachusetts Excise Tax on foreign corporations, as applied to the plaintiff-in-error, are constitutional and not in conflict with and in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States as depriving the petitioner of its property without due process of law, and denying the petitioner the equal protection of law, in that said statute imposes a tax on income of the business and sales made outside the said Commonwealth, and upon property located without said Commonwealth.

(6) The Court erred in holding that the provisions of the said Massachusetts Excise Tax on foreign corporations, contrued to include as assets in Massachusetts and subject to tax therein credits belonging to a foreign corporation exclusively engaged in interstate commerce, said credits arising exclusively from said interstate commerce, and also other intangibles consisting of stock in other foreign corporations owning no property in Massachusetts and not doing any business therein, and as so construed as applied to the plaintiff-in-error, are constitutional and not in conflict with and in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States, as depriving the petitioner of its property without due process of law, and denying the petitioner the equal protection of law.

(7) The Court erred in holding that the provisions of the said Massachusetts Excise Tax on foreign corporations, construed to impose a tax on a portion of the income of a foreign corporation engaged exclusively in interstate commerce, said portion being determined largely by an allocation to Massachusetts of stock in other foreign corporations owning no property in Massachusetts and doing no business therein, and of other intangibles not located in or connected with Massachusetts, and as so construed as applied to the plaintiff-in-error, are constitutional and not in conflict with and in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States, as depriving the petitioner of its property without due process of law and denying the petitioner the equal protection of law (Case #327, fols. 100-103).

SUMMARY OF POINTS.

I.

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THE CONSTITUTIONALITY OF THE MASSACHUSETTS STATUTE IS DRAWN IN QUESTION, THE DECISION OF THE HIGHEST COURT IN THE STATE IS IN FAVOR OF ITS VALIDITY, AND THE PLAINTIFF HAS PROPERLY BROUGHT THESE WRITS OF ERROR TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS 23

Dahnke-Walker Milling Co. v. *Bondurant*, 257 U. S., 282 .....

II.

PLAINTIFF'S SOLE BUSINESS, SO FAR AS IT TOUCHES THE STATE OF MASSACHUSETTS, IS INTERSTATE COMMERCE 24

III.

THE TAX HERE IN QUESTION IS AN EXCISE UPON THE DOING OF INTERSTATE COMMERCE, AMOUNTING TO A REGULATION AND DIRECT BURDEN THEREON, AND IS REPUGNANT TO THE COMMERCE CLAUSE, SECTION 8, ARTICLE 1 OF THE CONSTITUTION..... 25

(a) The possible subjects of taxation are persons, property and business.

State Tax on Foreign Held Bonds, 15 Wall., 300 25

(b) The tax here in question is obviously not a tax on persons, and, if so construed, would be invalid when attempted to be imposed on a foreign corporation.

United States v. *Erie Ry. Co.*, 106 U. S., 327..
Dewey v. *Des Moines*, 173 U. S., 193.....
City of New York v. *McLean*, 170 N. Y., 374.. 25

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(c) This tax, construed as applicable to the plaintiff, is an excise on the doing of interstate business, and is not a property tax. It was expressly so construed by the State Court in Case 103 (Record, p. 25), and in 26

Judson Freight Forwarding Co. v. *Commonwealth*, 242 Mass., 47, 51.....

If construed as a property tax, it would be invalid under the Massachusetts State Constitution because not proportional 28

Opinion of the Justices, 220 Mass., 613....
S. S. White Dental Mfg. Co. v. *Commonwealth*, 212 Mass., 35 .....

(d) An excise imposed by a state on the doing of interstate commerce is invalid because repugnant to the Commerce Clause of the Constitution 31

Cheney Bros. v. *Massachusetts*, 246 U. S., 147
State Freight Tax, 15 Wall., 232, 272.....
Dahnke-Walker Milling Co. v. *Bondurant*, 257 U. S., 282 .....
Crutcher v. *Kentucky*, 141 U. S., 47.....
Kansas City Ry. v. *Kansas*, 240 U. S., 227, 231
McCall v. *California*, 136 U. S., 104.....
Norfolk & Western Rd. Co. v. *Pennsylvania*, 136 U. S., 114 .....
Crenshaw v. *Arkansas*, 227 U. S., 389.....
The Texas Transport & Terminal Co. v. *New Orleans*, 264 U. S., 150 .....

IV.

THE TAX IS NOT IN SUBSTANCE A TAX ON PROPERTY 38

(a) This Court is bound by the construction of the State Court that it *was not* a tax on property, but *was* an excise on the doing of business.

Ward & Gow v. *Krinsky*, 259 U. S., 503.....
Northern Pacific Rd. v. *Meese*, 239 U. S., 614
Brown v. *Kentucky*, 217 U. S., 563.....
Price v. *Illinois*, 238 U. S., 446.....
Farncomb v. *Denver*, 252 U. S., 7 38

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(b) Upon the facts of record in these cases, figures from No. 103 being used, the tax is clearly not in substance a tax on property.

The tax is divided into two parts—(1) a direct income tax upon that portion of the total income that is attributed to Massachusetts; (2) measured by what is termed corporate excess.

(1) The tax on income.

This was levied under an express statutory formula. This provides an apportionment based upon three factors:

(a) The proportion of tangible property within the State compared with total tangible property, this attributing income to Massachusetts of ..... $ 30.30 39

(b) The proportion of wages and salaries of employes connected with or reporting to the Massachusetts office compared with total wages and salaries paid, this attributing income to Massachusetts of..... 2,609.05 40

(c) The proportion of gross receipts of sales made through the Massachusetts office or by employes sent out therefrom to the total gross receipts from all sales, this attributing income to Massachusetts of 12,730.71 42

Less than 1% of the income thus attributed to Massachusetts has any relation to property. The balance relates solely to plaintiff's interstate business.

The tax on income was $380.05, which obviously was not a tax on property stipulated to be worth about $500.

(2) The tax on corporate excess 45

Corporate excess is defined to be that portion of the fair value of the capital stock that the assets employed in business in Massachusetts bear to total assets.

But assets employed in business in Massachusetts have been construed to mean

(a) Tangible assets valued in this case at $573.

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(b) Intangible assets of $114,837 assigned a situs in Massachusetts as representing in substance an assessment of credits arising in interstate commerce and the franchise of doing interstate commerce.

The tax on corporate excess was $420.01, which obviously was not in substance a tax on property stipulated to be worth about $500.

It is apparent that under this construction of the statute the assessment of corporate excess has no more relation to property in the state which is subject to property taxation than has the tax on income.

They are both taxes on interstate commerce and not on property.

V.

IF THAT PORTION OF THE TAX MEASURED BY "CORPORATE EXCESS" CAN BE CONSTRUED TO BE IN SUBSTANCE A TAX ON PROPERTY, IT IS INVALID BECAUSE IN CONFLICT WITH THE COMMERCE CLAUSE AND THE XIV AMENDMENT TO THE CONSTITUTION

50

Plaintiff concedes that its tangible property in the state can lawfully be taxed. But this is negligible in amount, and this tax is concededly not on it.

(a) The tax is in conflict with the Commerce Clause of the Constitution 50

(1) Viewed as in substance a tax on property, a portion of the property taxed is, as the State Court said, "the credits due it from debtors within this Commonwealth."

While credits arising from the conduct of a local business have sometimes been given a situs at the residence of the debtor, this has never been held as to credits arising exclusively from interstate commerce. Furthermore such credits in interstate commerce are not taxable *subjects*. They are essentially the commerce itself and share its immunity from state taxation.

Crew Levick Co. v. *Pennsylvania*, 245 U. S., 292 .....

Champlain Realty Co. v. *Town of Battleboro*, 260 U. S., 366 .....

Dahnke-Walker Milling Co. v. *Bondurant*, 257 U. S., 282 .....

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Coe v. *Errol*, 116 U. S., 517.....
Bacon v. *Illinois*, 227 U. S., 504.....
Sonneborn Bros. v. *Cureton*, 262 U. S., 506..
Oliver Iron Mining Co. v. *Lord*, 262 U. S., 172
Burke v. *Wells*, 208 U. S., 14.....
Phila. & Southern S. S. Co. v. *Penn.*, 122 U. S., 326 .....
Pullman Co. v. *Richardson*, 261 U. S., 330....

(2) Characterizing the tax as in substance one on property, the remaining portion of the property taxed was said by the State Court to be "the exercise of its franchise within this Commonwealth."

But it is agreed that the only franchise used in the State is the franchise of engaging in interstate commerce, and that cannot be taxed by the State. The franchise to do business as a corporation is granted, not by Massachusetts, but by New Jersey.

None of the cases relied upon by the State Court in which a tax, in form on the franchise of a corporation engaged in interstate commerce, has been sustained, are applicable. In every such case the tax was sustained because it was found to be either

(a) in substance a tax on property subject to the State's taxing jurisdiction, and only in form on the franchise,

Western Union Tel. Co. v. *Mass.*, 125 U. S., 530 .....
Pullman Car Co. v. *Penn.*, 141 U. S., 18.....
Pullman Co. v. *Richardson*, 261 U. S., 330..
U. S. Express Co. v. *Minnesota*, 223 U. S., 335
Erie Rd. Co. v. *Pennsylvania*, 158 U. S., 431..
Western Union Tel. Co. v. *Taggart*, 163 U. S., 1 .....
Western Union Tel. Co. v. *Gottlieb*, 190 U. S., 412 .....

or

(b) a franchise tax upon a domestic corporation where the State taxed the privilege which it itself granted.

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Delaware Railroad Tax, 18 Wall., 206.....
Central Pacific Co. v. *California*, 162 U. S., 91 .....
Atlantic Tel. Co. v. *Philadelphia*, 190 U. S., 160 .....

(b) The tax is in conflict with the XIV Amendment 67

More than 99% of the "corporate excess" as assessed represented apportionment of intangibles. These intangibles were in Case 103

Bank deposits outside Massachusetts	**$ 121,726**
Accounts receivable	**652,313**
Good-will	**1,750,000**
Stock, Alpha Portland Cement Co. of Pa.	**4,500,000**
Other securities held outside Mass.	**1,553,616**
Total	**$8,577,655**

The Alpha Portland Cement Co. of Pennsylvania is a subsidiary company holding title to the Company's mills in Pennsylvania, and having no property in any other State. The indirect inclusion of any part of the stock of this Company, or of other securities held without the State, as taxable property in a foreign State, has been held to deprive the Company of its property without due process of law.

Peo. ex rel. Alpha Portland Cement Co. v. *Knapp*, 230 N. Y., 48. Rehearing denied, 231 N. Y., 516. Certiorari denied, 256 U. S., 702 .....

While specific property may have a greater value as a part of a going concern than considered alone, and while in assessing such property a State may properly take into account such increased value, it cannot through the form of such valuation in substance tax property situated without its borders.

Wallace v. *Hines*, 253 U. S., 66.....
Oklahoma v. *Wells, Fargo & Co.*, 223 U. S., 298 .....

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The assessment of plaintiff's "corporate excess" based chiefly upon an apportionment of intangible property not having a situs in Massachusetts, was in substance an assessment of property without the taxing jurisdiction of the State.

VI.

THE PART OF THE TAX MEASURED BY NET INCOME IS INVALID BECAUSE THE SUBJECT TAXED IS NOT ONE WHICH THE STATE HAS JURISDICTION TO TAX 73

As to this, the State Court found it was "dependent upon net profits derived solely from interstate commerce" (Record Case 103, p. 27).

It has been held that a state can levy an income tax on a resident over whom it has personal jurisdiction, and can measure that tax by the entire net income, although a considerable part is derived from interstate commerce or from export, that is, from a source which the state has no jurisdiction to tax.

Peck v. *Lowe*, 247 U. S., 165.....
U. S. Glue Co. v. *Oak Creek*, 247 U. S., 321....

But here the plaintiff is not a citizen or resident of Massachusetts, and there is no personal jurisdiction.

It has been held that a state can levy an income tax on a nonresident over whom it has no personal jurisdiction, and can measure that tax by that part of the net income which is derived from a source which the state has jurisdiction to tax.

The Yale & Towne Mfg. Co. v. *Travis*, 252 U. S., 60 .....
Shaffer v. *Carter*, 252 U. S., 37.....

But here the sole source of the income is interstate commerce, which the state has no jurisdiction to tax.

It has not been held

(a) That a tax is valid when levied with complete absence of jurisdiction over the subject taxed because it is measured by net income.

(b) That the fact that a tax is measured by net income gives a state the power to tax the subject of interstate commerce.

(c) That jurisdiction over the subject taxed is not as essential in the case of a tax measured by net income, as in the case of a tax measured in any other way.

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The State Court has overlooked the vital difference between the subject taxed and the measure of a tax.

Flint v. *Stone Tracy*, 220 U. S., 107.....

In every valid tax there must be jurisdiction over the subject taxed, which in the case of an income tax means either (1) *personal* over the taxpayer as the recipient of the income, or (2) *in rem* over the source of the income.

Here the tax must fail for absence of jurisdiction over any taxable subject.

ARGUMENT.

POINT I.

The constitutionality of the Massachusetts statute is drawn in question, the decision of the highest court in the State is in favor of its validity, and the plaintiff has properly brought these writs of error to the Supreme Judicial Court of the Commonwealth of Massachusetts.

In each case plaintiff, having been assessed a tax under Chapter 63 of the General Laws of Massachusetts and the acts in amendment thereof, and of Chapters 361 and 493 of the Massachusetts Acts of 1921, paid the tax under protest, and brought suit under the Massachusetts statutes to recover it back, alleging that the laws under which the tax was assessed were unconstitutional, in that they imposed a tax upon interstate commerce, and were therefore repugnant to the Commerce Clause, Sec. 8, Art. I of the Constitution; and also imposed a tax upon plaintiff's property outside the State of Massachusetts, and without its taxing jurisdiction, and therefore deprived plaintiff of its property without due process of law, and was repugnant to the Fourteenth Amendment to the Constitution.

The Supreme Judicial Court of Massachusetts, which is the highest court of the State, construed these laws as applicable to the plaintiff; and while expressly recognizing that the question of the constitutionality of the law must be decided by this Court, decided in favor of the constitutionality of the laws drawn in question, sustained the tax, and dismissed the suits.

Since the constitutionality of the laws construed by the State Court as applicable to the plaintiff has been directly drawn in question in the plaintiff's petitions in

the State Court, and since the question of constitutionality was considered and passed upon by the highest court of the State, and the decisions were in favor of the validity of the law and of its applicability to the plaintiff, the plaintiff's contentions in this respect are properly here on writs of error.

Dahnke-Walker Milling Co. v. *Bondurant*, 257 U. S., 282.

POINT II.

Plaintiff's sole business, so far as it touches the State of Massachusetts, is interstate commerce.

The facts as to this are not in dispute. Plaintiff is a New Jersey corporation. So far as its business touches Massachusetts, it is engaged solely in interstate commerce. It does no local or intrastate business. It maintains a small sales office solely as a means of conducting its interstate business. The facts are stipulated fully in the record, and are concisely reviewed in the opening statement (*supra*, pp. 4, 5).

On the agreed state of facts the State Court held

> "It is rightly conceded by the Attorney General that the petitioner was engaged in this Commonwealth exclusively in interstate commerce," (Record, Case 103, p. 24).

The State Court stated the issue before it on this finding as follows:

> "The question to be decided is whether a foreign corporation having a usual place of business in this Commonwealth used for interstate commerce alone is subject to taxation under the tax law" (Record, Case 103, p. 24).

POINT III.

The tax here in question is an excise upon the doing of interstate commerce, amounting to a regulation and direct burden thereon, and is repugnant to the commerce clause, Section 8, Article I of the Constitution.

In *State Tax on Foreign Held Bonds,* 15 Wall., 300, this court defined the possible subjects of taxation:

> "These subjects are persons, property, and business. Whatever form taxation may assume, whether as duties, imposts, excises, or licenses, it must relate to one of these subjects. It is not possible to conceive of any other, though as applied to them, the taxation may be exercised in a great variety of ways" (p. 319).

And an income tax affords no exception to this all-inclusive definition, which has frequently been cited by this Court with approval. An income tax may be a tax upon the recipient of the income, that is, a tax on persons, or it may be a tax upon the source of the income, that is, a tax on property or business. In either case, the income serves as a measure of the tax, but cannot itself be the subject of the tax. The income is a mere attribute, either of the owner of the income, or of the source from which it is derived, and can have no real existence apart from its subject. The tax here in question, therefore, considered with reference to the subject taxed, must either be a tax on persons, or a tax on property, or a tax on business.

It is obvious that the tax is not a tax on persons, and would be invalid if it should be so construed. The plaintiff is a New Jersey corporation, foreign to the Commonwealth of Massachusetts; and the Common-

wealth has no jurisdiction over it. That a State cannot constitutionally impose a personal tax on a non-resident is well settled.

> *U. S.* v. *Erie Railway Co.*, 106 U. S., 327;
> *Dewey* v. *Des Moines*, 173 U. S., 193;
> *City of New York* v. *McLean*, 170 N. Y., 374;
> *Wilcox* v. *City of Rochester*, 129 N. Y., 247;
> *Maltbie* v. *Lobsitz Mills Co.*, 223 N. Y., 227;
> *Barhyte* v. *Shepherd*, 35 N. Y., 237;
> *Cooley on Taxation*, 3rd Edition, page 24;
> *Brown, Jurisdiction of Courts*, 2d Edition, pp. 549-550;
> *State* v. *Ross*, 23 N. J. L., 517.

This limitation on the power of the State to impose a personal tax upon the plaintiff was apparently recognized by the State Court. At any rate, its opinion contains no suggestion that the tax here in question should be construed as a personal tax.

It follows that the tax must either be one on property or on business. Plaintiff contends that it is a tax on business, and in this point we consider the affirmative reasons for this contention, and in the following point we shall consider and attempt to show that the tax cannot be considered as one on property.

Section 39 of Chapter 63 of the General Laws imposing this tax, provides:

> "Every foreign corporation shall pay annually with respect to the carrying on or doing of business by it within the Commonwealth an excise equal to the sum of the following,"

and then follows the measure of the excise tax thus imposed for the privilege of doing business. The State Court has directly held that this tax is a tax upon business, and is not a property tax. The opinion sustaining the tax here in question says:

> "This tax law, placing as it does both domestic and foreign corporations on common ground as to taxation except so far as essential differences require different treatment in details, follows the policy established in this Commonwealth for many years of levying an excise instead of a property tax on corporate franchises and corporate transaction of business. *Eaton, Crane & Pike Co.* v. *Commonwealth*, 237 Mass., 523. • • • The present tax act imposes the excise with respect to the carrying on of business by foreign corporations within the Commonwealth. It is an excise for the privilege of having a place of business under the protection of our laws and with the financial, commercial and other advantages flowing therefrom measured solely by the property and net income fairly attributable to the business done here by a foreign corporation. The excise is measured by two factors,—(1) the value of the corporate excess employed within the commonwealth, and (2) the net income derived from business within the commonwealth" (Record, Case 103, pp. 23, 25).

The court thus followed its earlier decision as to the subject here taxed announced in

> *Judson Freight Forwarding Co.* v. *Commonwealth*, 242 Mass., 47, 51.

wherein it was said:

> "This tax in its nature is an excise and not a property tax. It is named an 'excise' in the statute. The declared purpose of the Legislature is accepted unless inconsistent with the meaning and effect of the enactment. *S. S. White Dental Manufacturing Company* v. *Commonwealth*, 212 Mass., 35, 40. It is levied 'in respect to the carrying on or doing of business by it within the Commonwealth.' It is an excise for the commodity or privilege of having a place of business in Massachusetts with the protection of our laws

> and the financial, commercial and other advantages appertaining thereto. *Attorney General* v. *Electric Storage Battery Co.*, 188 Mass., 239, 240."

An analysis of the tax under the statutes in question makes clear the fundamental characteristics of the tax in its relations with the system of taxation established by the Constitution of Massachusetts. It shows that this tax is in substance, as well as in form, not a property tax, but an excise on the doing of business, and that the decision of the State Court to this effect is a binding construction and interpretation of the statute, and not a mere characterization thereof.

The Constitution of Massachusetts, Chapter I, Section I, Article 4, empowers the general Court

> "to impose and levy proportional and reasonable assessments, rates, and taxes upon all the inhabitants of, and persons resident, and estates lying, within the said commonwealth; and also to impose and levy reasonable duties and excises upon any produce, goods, wares, merchandise, and commodities whatsoever, brought into, produced, manufactured, or being within the same."

As the Supreme Court of Massachusetts has said in *Opinion of the Justices*, 220 Mass., 613, 618:

> "These words contain the entire grant to tax. They comprehend two general powers, one to lay assessments, rates and taxes upon persons and property, the other to impose duties or excises upon commodities. These two branches of the taxing power are clearly separated. They are different in kind and are expressed in different terms. The power to tax, which includes the power to levy assessments, rates and taxes, relates to persons and property. The power in this respect is not boundless. It is restricted to the extent that it must be 'proportional and reasonable.' These are words of limitation. Cap-

itation and property taxes must be levied in conformity to this limitation. The significant word in the present connection is 'proportional.' A general property tax, in order to be proportional, must be divided so that the amount to be raised shall be shared by the taxpayers according to the taxable real and personal estate of each. A tax for local improvement must be apportioned according to the benefit accruing to the several estates from the public expenditure. While the power to tax includes all persons and all estates within the Commonwealth, and this is most comprehensive, at the same time the restriction to the effect that all taxes must be 'proportional' is equally extensive. On the other hand an excise, including thereby both duties and excises, is of a different character. It need not be based on any rule of proportion. It must only be 'reasonable.' It is a fixed and absolute charge upon the element selected, without reference to the amount of property or the benefit of the taxpayer."

While this case was decided before the adoption of the 44th amendment to the State Constitution, which authorizes the General Court to impose a general income tax, that amendment did not affect the questions discussed in the foregoing quotation, nor the question involved in this case of whether under the State Constitution the tax here in question can be considered as a property tax.

A grant of power to impose and levy excises upon commodities has been from the earliest days the basis of the taxation of corporations in Massachusetts, both foreign and domestic. In the case of foreign corporations, the commodity upon which the tax is imposed is the privilege of doing business within the Commonwealth, and an excise upon this privilege as a commodity has been justified by reason of the power of the state to withhold its sanction. Upon this basis taxes have been

imposed which could be sustained upon no other ground under the Massachusets Constitution.

S. S. White Dental Mfg. Co. v. *Commonwealth,* 212 Mass., 35;
Attorney General v. *Electic Storage Battery Co.,* 188 Mass., 239;
Attorney General v. *Bay State Mining Co.,* 99 Mass., 148.

In this respect the position of a corporation under the Massachusetts Constitution differs widely from that of an individual, as to whom the power of the Legislature to impose an excise with respect to the privilege or commodity of engaging in a business, which is a natural right, has been the subject of much difference of opinion.

Opinion of the Justices, 196 Mass., 603;
Minot v. *Winthrop,* 162 Mass., 113;
Gleason v. *McKay,* 134 Mass., 419.

The Constitution of Massachusetts and the decisions of the Massachusetts Supreme Court have made it abundantly clear precisely what the tax on foreign corporations is, and equally clear what it is not. The tax is not a property tax, nor an income tax. It is not a tax on the franchise as property, because it is not a property tax at all. Neither is it an excise on the right to exist and function as a corporation, for that is a right conferred by the law of a foreign State, and is not a commodity subject to an excise under the Constitution of Massachusetts.

Attorney General v. *Bay State Mining Co.,* 99 Mass., 148, 152.

The tax is purely and simply an excise based upon the privilege of engaging in business within the State of Massachusetts, and of maintaining as a means thereof a place of business therein. The decision to this effect by the State Court in this case is correct, and this Court has often held that on the question of the construction of a State statute, it is concluded by the decision of the State Court (*infra*, p. 38).

It is conceded by the State, and was expressly found by the State Court, and correctly found, as we have shown *supra*, Point II, that the plaintiff's sole business in Massachusetts is the doing of interstate commerce; and plaintiff therefore submits that it necessarily follows that this tax is an excise imposed upon the plaintiff for the privilege of engaging in the business of interstate commerce. So construed, the tax is clearly unconstitutional and void as repugnant to the Commerce Clause of Section 8, Article I of the Constitution of the United States. It was held by this Court in

Cheney Bros. Co. v. *Massachusetts*, 246 U. S., 147,

that an excise tax imposed under the Massachusetts statute of 1909, Chapter 490, upon a foreign corporation engaged solely in interstate commerce was void as repugnant to the commerce clause. The subject sought to be taxed in the 1909 excise and in the present act is the same,—namely, the privilege of doing business in the Commonwealth. This Court held in the *Cheney Bros.* case that where that business was solely interstate commerce, it was not subject to a state excise tax. The Legislature in both cases applied the tax to the same class of corporations. The difference is solely in the measure of the tax. The excise under the 1909 statute

was measured by the amount of capital stock, with a maximum of $2,000. The present statute measures the excise by a combination of two percentages,—one based on the proportion of its property attributable to Massachusetts business, and the other on the proportion of its net income attributable to Massachusetts business.

The State Court held that the present law "differs in its essential characteristics" from the earlier laws of 1903 and 1909. But as clearly appears from the court's opinion, as well as from a reading of the statutes, (present statute Record, Case 103, pp. 31-40, earlier statute printed as an appendix to this brief), the differences are not in the nature of the tax, nor in the subject to which it applies, but are solely in the measure of the tax and in the means provided for its enforcement and collection. Neither the present law nor the earlier ones were taxes on property, but are alike excises upon the privilege of having "an establishment" or "place of business" in Massachusetts. Under the earlier laws it was held that the State could not tax the subject, where the taxpayer's business was exclusively interstate commerce. This decision was not predicated upon the means provided for enforcing the tax, but upon the entire immunity of the subject taxed. In the *Cheney Bros. Co.* case (*supra*) the Court said:

> "the maintenance of the Boston office and the display therein of a supply of samples are in furtherance of the company's interstate business and have no other purpose. Like the employment of the salesmen, they are among the means by which that business is carried on and share its immunity from state taxation" (p. 153).

Concededly, in this case, the company's place of business in Massachusetts is maintained exclusively as a means of carrying on interstate commerce; and as in the *Cheney Bros.* case, that "means" is immune from State

taxation. The question of enforcement, of penalties for non-payment, was not mentioned by this Court, and formed no part of the basis of its decision. Specifically, the State Court distinguished the present statute from those previously condemned by this Court (Record, Case 103, pp. 24, 25 and 29) on the ground that payment of the tax is not here expressly made a condition precedent to doing business, and that the statute does not in terms prohibit interstate business if the tax is not paid. As to this it is sufficient to say that it has never been held that this is a necessary requisite of an invalid restraint on interstate commerce. Where payment of an otherwise valid tax is made a condition precedent of the right to do an interstate business, the condition or penalty is void.

> *St. Louis S. W. Ry. Co.* v. *Arkansas,* 235 U. S., 350.

But it has never been suggested in any case that the omission of such an invalid condition, validated an otherwise invalid tax, or conferred jurisdiction to tax that which is not legally taxable.

That the validity of the tax is not affected by the validity or invalidity of the means for enforcing it was recognized in *Shaffer* v. *Carter,* 252 U. S., 37, where the Court said, at page 49:

> "The tax might be valid, although the measures adopted for enforcing it were not."

We submit that the differences in the means of enforcing this act from those provided in the Act of 1909 do not affect the question of the validity of the tax, and that these cases are directly ruled by the *Cheney Bros.* case.

Furthermore in distinguishing the present statute from that condemned in the *Cheney Bros* case on the ground that under the earlier statute "the right to do

business depended upon the payment of the tax," the State Court must have overlooked the provisions of Section 75 of the statute (*supra* p. 5). This section provides that if the tax is not paid the attorney general may bring suit by an information in which "the Court may issue an injunction upon such information, restraining the further prosecution of the business of the company association or corporation until such taxes with interest and costs thereon have been paid."

Applying the rule of substance we submit that "the right to do business depended upon payment of the tax" under the present statute just as it did in the statute of 1909 condemned in the *Cheney Bros* case and that the State Court erred in distinguishing between the two statutes on this ground.

The privilege of doing an interstate business in Massachusetts, the subject here sought to be taxed, is protected by the Commerce Clause of the Federal Constitution; and if the subject is protected, consideration of the means by which the amount of the tax is reached must be immaterial; and this Court has held that the subject is protected. Furthermore, the rule here contended for is well settled, and does not depend upon the authority of a single case.

In *State Freight Tax*, 15 Wall., 232, 272, this Court said:

> "It has repeatedly been held that the constitutionality or unconstitutionality of a state tax is to be determined, not by the form or agency through which it is to be collected, but by the subject upon which the burden is laid."

This court said in *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S., 282, 291:

> "A corporation of one state may go into another, without obtaining the leave or license of the latter, for all the legitimate purposes of such commerce; and any statute of the latter state

> which obstructs or lays a burden on the exercise of this privilege is void under the commerce clause."

In *Crutcher* v. *Kentucky,* 141 U. S., 47, 57, the Court said:

> "To carry on interstate commerce is not a franchise or a privilege granted by the state; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States; and the accession of mere corporate facilities, as a matter of convenience in carrying on their business, cannot have the effect of depriving them of such right, unless Congress should see fit to interpose some contrary regulation on the subject."

In *Kansas City Ry.* v. *Kansas,* 240 U. S., 227, 231, the court said:

> "It must be assumed, in accordance with repeated decisions, that the state cannot lay a tax on interstate commerce 'in any form' by imposing it either upon the business which constitutes such commerce or the privilege of engaging in it or upon the receipts as such derived from it."

In *McCall* v. *California,* 136 U. S., 104, a railroad between New York and Chicago established an agency in San Francisco to solicit business. In holding a tax "imposed upon the agent for the privilege of doing business in San Francisco is a tax upon interstate commerce and is therefore unconstitutional," the Court quoted with approval Pomeroy's definition of commerce in his work on "Constitutional Law," Section 378:

> "It includes the *fact of intercourse and of traffic* and the subject matter of intercourse and traffic. The fact of intercourse and traffic, again, embraces all the *means, instruments* and places by and in which intercourse and traffic are carried on, and further still comprehends the act of carry-

> ing them on at these places and by and with these means. The subject matter of intercourse or traffic may be either things, goods, chattels, merchandise, or persons. All these may therefore be regulated."

This decision was followed in the very recent case of *The Texas Transport & Terminal Co.* v. *New Orleans*, 264 U. S., 150, where the Court stated:

> "the general and well established rule, which is that a state or state municipality is powerless to impose a tax upon persons for selling or seeking to sell the goods of a non-resident within the state prior to their introduction therein, *Stockard* v. *Morgan*, 185 U. S., 27; or to impose a tax upon persons for securing or seeking to secure the transportation of freight or passengers in interstate or foreign commerce" (*McCall* v. *California*, 136 U. S., 104).

In *Norfolk & Western R. R. Co.* v. *Pennsylvania*, 136 U. S., 114, the state imposed a tax for the privilege of keeping an office in the State for the use of its officers and employes. That is, the subject taxed was precisely the same as in the case at bar. In holding the tax void, the court said:

> "That office was maintained because of the necessities of the interstate business of the company, and for no other purpose. A tax upon it was, therefore, a tax upon one of the means or instrumentalities of the company's interstate commerce; and as such was in violation of the commercial clause of the Constitution of the United States." P. 120.

In *Crenshaw* v. *Arkansas*, 227 U. S., 389, the Court reiterated the rule stated in *Robbins* v. *Shelby County Taxing District*, 120 U. S., 489, saying:

> "The negotiation of sales of goods which are in another state for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce, and it was held beyond the power of the state to impose a license tax upon the privilege of conducting such business. That case has been strictly adhered to in this court since its decision, and it is only necessary to notice a few of the many cases in which it has been applied."

To the same effect are:

Philadelphia & Southern S. Co. v. *Pennsylvania*, 122 U. S., 326;
Leloup v. *Mobile*, 127 U. S., 640;
Lyng v. *Michigan*, 135 U. S., 161;
Galveston, Harrisburg, &c., Ry. v. *Texas*, 210 U. S., 217;
West. Union Tel. Co. v. *Kansas*, 216 U. S., 1;
Pullman v. *Kansas*, 216 U. S., 56;
Meyer v. *Wells, Fargo & Co.*, 223 U. S., 298;
Baltic Mining Co. v. *Massachusetts*, 231 U. S., 68;
Stockard v. *Morgan*, 185 U. S., 27;
Caldwell v. *North Carolina*, 187 U. S., 622.

As the privilege here sought to be taxed is the plaintiff's engaging in interstate commerce, and nothing else, the foregoing authorities would seem definitely to dispose of these cases, and to require a reversal of the judgments of the State Court.

POINT IV.

The tax is not in substance a tax on property.

The State Court expressly construed this tax to be an excise on the doing of business, and not a property tax (Record, case 103, p. 25).

> *Judson Freight Forwarding Co.* v. *Commonwealth,* 242 Mass., 47, 51.

As we have shown in the preceding point, this construction was necessary to avoid the limitations of the State Constitution. This was, therefore, a true construction of the act and a determination of the subject taxed by the highest Court of the State and is binding on this Court.

> *Ward & Gow* v. *Krinsky,* 259 U. S., 503;
> *Northern Pacific R. R. Co.* v. *Meese,* 239 U. S., 614;
> *Brown* v. *Kentucky,* 217 U. S., 563;
> *Price* v. *Illinois,* 238 U. S., 446;
> *Farncomb* v. *Denver,* 252 U. S., 7.

In sustaining the tax here in question, the State Court found itself between Scylla and Charybdis. On the one hand, if the tax was held to be a property tax, and not an excise, it was invalid under the State Constitution; if it was an excise on the doing of business, and not a tax on property, then as applied to the doing of interstate commerce, it was invalid under the Federal Constitution. The court accordingly held that the tax must be construed as an excise or business tax, and not as a tax on property, but sustained the tax on the authority of cases in this Court sustaining taxes as in substance taxes on property.

It is submitted that these two positions are mutually inconsistent, and that the tax cannot be construed as in substance a property tax.

The tax is divided into two parts,—one measured by what is termed "corporate excess," and the other by a portion of the corporation's net income attributed to Massachusetts. Since the determination of corporate excess is based upon the determination of the proportion of corporate income attributable to Massachusetts, we consider first that portion of the tax which is based on income.

(a) *The Tax on Income.* This part of the tax was assessed in accordance with the express provisions of the statute, which effectively negatives any contention that it was levied with any relation to the property in the State, or that it can fairly be considered as a tax on income derived from such property, or as in substance a tax on property in the State.

The following discussion is based on Case 103. Case 327 presents the same general legal question, with slight changes in the figures and computation.

It is stipulated:

> "The only property owned by the petitioner in the Commonwealth of Massachusetts, real or personal, is the office furniture in the sales office valued at about Five hundred dollars ($500)" (Record #103, p. 19).

The tax was assessed on net income apportioned to Massachusetts of $15,370., and the net income tax was $380.05. This was determined as follows.

The total net income of the corporation reported to the Federal Internal Revenue Department, less interest from bonds and notes, was found to be $1,148,041.70. This was divided into three equal parts, according to the statutory direction.

> "Of one third, such portion shall be attributed to business carried on within the commonwealth as shall be found by multiplying said one third by a fraction whose numerator is the value of the corporation's tangible property situated within the commonwealth, and whose denominator is the

value of all of the corporation's tangible property wherever situated" (Statute Sec. 38, par. 2a; Record #103, p. 35).

It was agreed that the tangible property in Massachusetts was of the value of $573. The Company contended that its tangible property outside the State was $11,735,209.40. This included $4,500,000., the value of the stock of a subsidiary company which holds title to the company's mills and real estate in Pennsylvania. The company contended that there was an equitable conversion of this stock which for the purposes of this case should be considered as tangible property. It relied upon *People ex rel Alpha Portland Cement Co.* v. *Knapp,* 230 N. Y., 48, certiorari denied, 256 U. S., 702. The State denied this contention.

Thus, the plaintiff contended that under the statute, the proper fraction to use was $\frac{573}{11,735,209.40}$; while the State used as a fraction in assessing the tax $\frac{573}{7,235,209.40}$. The resulting income apportioned to Massachusets was, by the use of plaintiff's fraction $18.37, and by the use of the State's fraction, $30.30. The difference in dollars is insignificant. The difference is of importance because (1) the State Court sustained this ruling upon the ground that the tax on the income here levied was not the same as the New York tax, and that the case was, therefore, not ruled by the New York case; and (2) the same principle was applied in determining the value of the corporate excess taxed under another section of the statute, and whose nature is considered *infra.*

> "Of another third, such portion shall be attributed to business carried on within the commonwealth as shall be found by multiplying said third by a fraction whose numerator is the expenditure of the corporation for wages, salaries, commissions or other compensation to its employes, and assignable to this commonwealth as hereinafter provided, and whose denominator

is the total expenditure of the corporation for wages, salaries, commissions or other compensation to all its employes" (Statute Sec. 38, par. 2b; Record #103, p. 35).

"The amount assignable to this commonwealth of expenditure of the corporation for wages, salaries, commissions or other compensation to its employes shall be such expenditure for the taxable year as represents the compensation of employes not chiefly situated at, connected with or sent out from premises for the transaction of business owned or rented by the corporation outside of the commonwealth" (Statute Sec. 38, par. 5, Record #103, p. 36).

The company has a clerk in the Massachusetts office, and four salesmen who travel throughout New England. The total salaries paid were $17,780. Apportioning the time of the salesmen to Massachusetts, their salaries while working in Massachusetts amounted to $11,023.60. The total salaries and wages were $2,607,862.20. The company contended that under the statute the fraction should be $\frac{11,023.60}{2,607,862.20}$, giving an apportionment of income to Massachusetts under the second subdivision of this section of the statute of $1,607.26; while the State, rejecting this contention, and including the salaries of the men selling goods in interstate commerce in other States, used the fraction $\frac{17,780}{2,607,862.20}$, giving an apportionment of income to Massachusetts of $2,609.05. Here again the money difference is insignificant. The important point is that there is no conceivable relation between this apportionment of income and the company's property in Massachusetts. It is an apportionment, not, it is true, of direct receipts in interstate commerce, but of direct expenses in interstate commerce. And the rejection of the company's contention in this respect emphasizes the absence of any relation between this tax on income and the property within the State, or the income thereon. Obviously, this part of the tax has no relation

to property. It is concerned solely with interstate commerce as such. It is definitely a tax on salesmen travelling in interstate commerce. This has often been held illegal.

Robbins v. *Shelby County Taxing District*, 120 U. S., 489.

The fact that the ultimate tax is measured by net income from this interstate commerce instead of being a per capita fee obviously does not change the subject taxed. A State cannot by indirection levy a tax which it is forbidden to levy directly.

Welton v. *Missouri*, 91 U. S., 275.

So far as this portion of the tax is concerned, it is not in any respect affected by the presence or absence of property in the State, and it would not be lessened if the company owned not one penny therein.

> "Of the remaining third, such portion shall be attributed to business carried on within the commonwealth as shall be found by multiplying said third by a fraction whose numerator is the amount of the corporation's gross receipts from business assignable to this commonwealth as hereinafter provided, and whose denominator is the amount of the corporation's gross receipts from all its business" (Statute Sec. 38, par. 2c; 5; Record #103, p. 36).
>
> "The amount of the corporation's gross receipts from business assignable to this commonwealth shall be the amount of its gross receipts for the taxable year from (*a*) sales, except those negotiated or effected in behalf of the corporation by agents or agencies chiefly situated at, connected with, or sent out from premises for the transaction of business, owned or rented by the corporation outside of the commonwealth, and sales otherwise determined by the Commissioner to be attributable to the business conducted on such premises;

(*b*) rentals or royalties from property situated, or from the use of patents, within the commonwealth. * * * If a corporation maintains an office, warehouse or other place of business in a state other than this commonwealth for the purpose of reducing its tax under this chapter, the Commissioner shall, in determining the amount of its gross receipts from business assignable to this commonwealth, include therein the gross receipts from sales attributed by the corporation to the business conducted at such place of business in another state" (Statute Sec. 38, pars. 6, 7; Record #103, p. 36).

There was no dispute in construing the statute as to its application to the plaintiff in connection with this item. Under this definition of business assignable to Massachusetts, the gross receipts were returned as $424,982.70, and the gross receipts from all business at $12,774,825.05, and the mathematical calculation gave $12,730.71 as the share of net income of the corporation apportioned to Massachusetts under this section of the statute.

Here, again, the basis of assessment obviously has no relation whatever to property in the State. The subject taxed was the sale by the corporation in interstate commerce to customers ordering through salesmen traveling from the Massachusetts office. The distinction is clearly marked and defined in the cases. For example, in *Pullman* v. *Richardson,* 261 U. S., 330, the corporation had a large amount of property in the shape of Pullman cars located in the State of California. These cars were used in part in interstate commerce, and in part in intrastate commerce. A tax was levied, which this court held was merely an ordinary tax upon the property in the State, a subject which the State had admitted jurisdiction to tax, even though that property was an instrumentality used in interstate commerce. The court sustained a method of valuing that property and

of measuring the tax which took into account the gross receipts proportioned in accordance with mileage.

So, in the recent case of *Seaboard Air Line* v. *Daughton,* 262 U. S., 413, a tax on the net income of railroads apportioned according to the mileage of the roads within and without the State, was sustained as in substance a tax on the income derived from the use of property which was itself subject to the taxing power of the State.

But obviously, the gross receipts in this case, $424,982, have no relation to property valued at $573. The gross receipts might have been just as large if the property was of no value, and there might well have been property of large value with no gross receipts. In the railroad cases and other similar decisions by this Court, in which a tax measured by interstate commerce has been sustained, there has been some reasonable relation between the measure of the tax and the value of the property which was held to be in substance the subject taxed.

The question of the validity of the tax, construed as a tax on property, is considered in a subsequent point. Here we confine ourselves to showing that the tax cannot fairly be considered as a tax on property.

The real test as to whether this statute can be construed as a tax on property within the State measured by income is found in the question whether or not the tax as actually assessed and paid is more than a reasonable tax on the property, considered as an ordinary property tax. Here it is stipulated and agreed that the total value of the property, real and personal, in the State of Massachusetts was only about $500. The tax on income levied and paid in connection with this property was $380.05, to which must be added the further sum of $420.01, the tax measured by the corporate excess, and which can be sustained, if at all, only upon the theory that it is also a tax on property within the

State. We have, therefore, an annual tax of $800 on property of an agreed value of $500. Obviously, this is not a normal and reasonable tax on property. Clearly, the tax is not levied at all upon property in the State, but upon something else; and this leads inevitably to the conclusion that the something else which is taxed in this case is that which is used as the measure of the tax, —to wit, the interstate commerce.

(b) *The tax on corporate excess.* Similarly, the portion of the tax measured by corporate excess cannot be construed as a tax on property subject to the State's taxing jurisdiction. This tax is at the rate of $5 a thousand upon the value of the corporate excess employed by it within the Commonwealth. Section 30 of the statute provides:

> " 'Corporate excess employed within the Commonwealth' by a foreign corporation, such proportion of the fair value of all the shares constituting the capital stock on the first day of April when the return called for by section 35 is due as the value of the assets, both real and personal, employed in any business within the Commonwealth on that date, bears to the value of the total assets of the corporation on said date."

less certain deductions not applicable to the case at bar.

The method of calculation of the assessment of corporate excess is not shown in detail in the record in Case 103. All that there appeared was the stipulated fact that the only property, real or personal, in the State was office furniture valued at about $500 (Record #103, p. 19), more accurately stated at page 14 at $573. The corporate excess was valued at $84,001.21. While the way in which this surprising result was reached is not shown in this case, the State Court explained it in its opinion (Record #103, p. 29), saying:

> "The tax upon the petitioner in substance and effect, so far as concerns the factor of its corpo-

> rate excess employed within the Commonwealth, is levied upon its tangible personal property within the Commonwealth, upon the credits due it from debtors within this Commonwealth and upon the exercise of its franchise within this Commonwealth."

The Court thus recognized that a corporate excess valuation of $84,001.21 could not be based on a property valuation of $573.

While the detail is not shown in the record, there is no dispute as to the computation. The proportion that the portion of the remainder of income allocable in Massachusetts under the provisions of Section 41 of the Act bears to the total of said remainder of income, was applied to the total intangible assets of the corporation, the product being assumed to be the amount of intangible assets employed in business in Massachusetts. This was added to the local tangible assets, and the sum was considered the total assets employed in business in Massachusetts under the statutory formula.

Applying this formula, to the $573, value of tangible property, there was added the sum obtained by multiplying the corporation's total intangible assets as determined—that is, $8,577,655 by the fraction $\frac{15370}{\$1,148,041.70}$.

In this fraction the numerator represents the total net income apportioned to Massachusetts under the forty-second section of the statute, and which we have already considered; and the denominator represents the corporation's total net income. That is, there was apportioned to Massachusetts as its share of the value of the corporation's interstate commerce franchises and receivables the sum of $114,837, and the property in the State of $573 was thus arbitrarily increased so that the application of the statutory formula gave an assessment of corporate excess of $84,001.21. We submit that the tax on corporate excess construed to be measured by a

proportion of interstate commerce applied to property without the State, cannot be construed as in substance a tax on property in the State.

The method of assessing corporate excess was shown in detail in the record of Case No. 327, and is summarized *supra*, p. 10. It was the same as that just explained in connection with Case 103. In the second case the State Court, after saying the computation was in conformity with the statute, continued:

> "The former decision rested in its ultimate analysis upon the theory that under the statute the excise might be measured in part upon intangible assets of the petitioner having a situs in this Commonwealth and arising exclusively from the conduct of its interstate business" (Case #327, fol. 95).

And the opinion then seeks to establish the legal jurisdiction to impose a property tax on credits arising in interstate commerce. The legality of such a tax is considered in the next point.

Here, we emphasize that this tax on corporate excess is not in fact in substance a property tax on credits. Aside from the negligible tangible assets corporate excess is determined by two factors: (1) the amount of plaintiff's intangible assets, and (2) the proportion thereof assigned to Massachusetts. Of the first of these, the total intangibles were (in Case 103) $8,577,655, of which only $652,313 consisted of accounts receivable. That is, less than ten per cent of the base were credits. Of the second factor, the amount of credits existing at any one time was not shown at all. But assuming an allocation of gross receipts is equivalent to an allocation of credits, that allocation is applied to only one-third of the income; and the resulting proportion is applied to a base of which less than ten per cent. represents the value of credits. Obviously, therefore, the allocation of intangibles to Massachusetts is not in substance based upon credits due

from Massachusetts customers. If credits are in proportion to sales (which the state court seems to have assumed), the credits in Massachetts would have been

$$\frac{424982 \text{ Mass. sales}}{12774825 \text{ gross sales}} \times \$652{,}313 \text{ (total credits)} = \$21{,}656.79$$

And further the Massachusetts sales were not under the statute sales to Massachusetts customers, but were sales made throughout New England by salesmen traveling from the Massachusetts office.

The actual assessment assigned more than $114,000 of intangibles to Massachusetts. The admitted facts do not support the dictum of the state court that the tax on corporate excess is in substance a tax on credits arising from sales to Massachusetts customers.

If in construing this part of the statute, the State Court had held that "assets employed in business" in Massachusetts meant, as on a literal reading it would seem to mean, property real and personal in the State, then it might fairly be contended that this part of the tax was in substance a tax on such property. Since the value of its capital stock was somewhat less than its total assets, because of the deduction of liabilities, the corporate excess on that construction would have been valued at less than $500, and the tax assessed at about $2.50.

Of course, the question here presented is as to the legal significance of the tax as it has been construed by the State Court and enforced against the plaintiff. So construed, it seems clear that an assessment of corporate excess of $84,000 cannot be considered as in substance an assessment and tax upon property of the agreed value of $500, and that idea was definitely repudiated by the State Court in its opinion in Case 327. The suggestion that this tax is in substance a tax on property by the State Court is a mere characterization of the statute, which does not bind this Court, as distin-

guished from a construction or interpretation of a statute, which does control.

Federal Land Bank v. *Crosland,* 261 U. S., 374, 378;
St. Louis, Southwestern Ry. Co. v. *Arkansas,* 235 U. S., 350, 362;
St. Louis Cotton Compress Co. v. *Arkansas,* 260 U. S., 346.

The admitted fact is that the tax department had no evidence not in the record in making this assessment. The report upon which this assessment was based does not show the amount of receivables due from Massachusetts customers existing at any time or on an average. This information was not requested, nor desired, nor furnished. If the tax was to be considered as a tax on property, and the assessment a means of valuing these credits as property, then it is obvious that a direct statement as to their amount and value would have been required. We submit that to characterize this tax as equivalent to a tax on an assumed credit as property is quite unwarranted by the facts in the case.

Plaintiff, of course, recognizes the rule stated in *Adams Express Co.* v. *Ohio,* 166 U. S., 185, that tangible property of a corporation may have a greater value considered as a part of the property of a going concern, than when considered as detached and separate from all other property. Conceivably, plaintiff's office furniture, thus considered, might have a greater value than when considered as separate articles. But this tax cannot be sustained upon any such theory, because

(1) In Case No. 327 the State Court expressly held that the tax was not based upon any such theory and that the assessment was based not upon a valuation of these assets, but upon intangibles.

(2) It is stipulated in Case 103 that the value of all of plaintiff's property in Massachusetts was "about $500." In the face of this stipulation, it cannot be contended that an assessment of $84,000 represents a valuation of that which is thus stipulated to be worth only $500.

(3) Any enhancement of actual physical values must proceed upon some reasonable basis, which will ordinarily give a fair value to the property in the State considered as a part of a going concern. The method followed in this case has no such relation. Considered with respect to the value of property in the State, the assessment is wholly arbitrary.

Plaintiff submits that as to both parts of the tax, it is a tax on interstate commerce and not a tax on property.

POINT V.

If that portion of the tax measured by "corporate excess" can be construed as in substance a tax on property, it is invalid because in conflict with the commerce clause and the XIV amendment to the Constitution.

(a) It is in conflict with the commerce clause.

The theory upon which the State Court has sustained that portion of the tax measured by corporate excess is not altogether clear, but it was apparently that this part of the tax could be considered as in substance a tax on property. Thus, the Court said, in Case 103, page 29, the tax

> "in substance and effect, so far as concerns the factor of its corporate excess employed within the Commonwealth is levied upon its tangible per-

sonal property within the Commonwealth, upon the credits due it from debtors within this Commonwealth, and upon the exercise of its franchise within the Commonwealth."

And again, the Court said:

"It is manifest as matter of common business knowledge that commerce within this Commonwealth yielding to the petitioner annual gross receipts of $424,982.70, must have involved credits, bills receivable, and obligations to it of considerable amounts. No contention to the contrary has been urged by the petitioner. Such credits, bills receivable, and obligations might be made subject to direct taxation within the Commonwealth by appropriate legislation under numerous decisions of the United States Supreme Court. Such credits, bills receivable, and obligations constitute a part of 'the value of the assets' of the petitioner 'employed in business within the Commonwealth' used as the basis of ascertaining 'the corporate excess' of the petitioner 'employed within the Commonwealth' upon which this factor of the excise is calculated" (Case #103, p. 26).

And this view was amplified in Case No. 327, where the Court said:

"The former decision rested in its ultimate analysis upon the theory that under the statute the excise might be measured in part upon intangible assets of the petitioner having a situs in this Commonwealth and arising exclusively from the conduct of its interstate business. We understand that credits due from residents within this Commonwealth to non-residents may be made the subject of direct property taxation here. *Metropolitan Life Ins. Co. of New York* v. *New Orleans*, 205 U. S., 395; *Liverpool, London & Globe Ins. Co.* v. *Orleans Assessors*, 221 U. S., 346; *Board of Assessors* v. *Comptoir National D'Escompte*, 191 U. S., 388; *Shaffer* v. *Carter*, 252 U. S., 37, and cases there reviewed. The source from which such cred-

> its arise is not material. They are not immune from taxation because coming into existence through the transaction of interstate commerce. That being so, it would seem that such credits may be used as a measure of an excise" (Case #327, fols. 95, 96).

As to the last sentence in this quotation, it is, of course, true that property which is in itself exempt from taxation may lawfully be "used as a measure of an excise," always providing the excise is itself upon a subject that may be lawfully taxed. But the state's argument here is that while the excise is in form on a subject immune from taxation, the tax can be sustained on the theory that it is in substance a tax on property which can be directly taxed. As to this, therefore, the question is not whether these credits can be used as the measure of an excise, but whether the credits can be themselves directly taxed.

In holding that these assumed credits were subject to direct taxation by the State, and that therefore the use of these credits in determining corporate excess could be sustained as in substance equivalent to a property tax thereon, the Court entirely overlooked the nature of these credits. Its statement that, "the source from which such credits arise is not material," is hardly in accordance with the decisions of the Court cited and relied upon.

These cases dealt solely with the question as to whether the credit considered as property had a *situs* in the taxing State.

In all of them the taxpayers were doing a local business in the State, and the credits existed as a part of this business. In the *Liverpool* case the decision was rested directly upon this ground, the Court saying:

> "The indebtedness had its origin in the course of business transacted by the foreign corporation in Louisiana under the laws of that state" (p. 353).

"The credits would have had no existence save for the permission of Louisiana; they issued from the business transacted under her sanction within her borders" (p. 355).

But here the plaintiff's business is not transacted under the laws of Massachusetts; nor is it transacted by virtue of any sanction from that State. Its business is exclusively interstate commerce transacted under the sole sanction and protection of the Federal Government and the Federal Constitution.

The reason for assigning a *situs* at the debtor's residence to credits fails when those credits arise, not by virtue of, but regardless of, the sanction or permission of the State of the debtor's residence.

If a debtor residing for example in New York removes his residence to Massachusetts, it would hardly be contended that the mere fact of residence operated to make the debt taxable property in the hands of the debtor and at the place of his residence. When such a *situs* has been given it has invariably been because the circumstances attending the creation of the debt or the actual location of the physical evidence thereof operated to give it a local *situs*. It has never been suggested that debts arising from interstate commerce were so affected and none of the cases so hold.

We submit that as a matter of *situs* these credits arising wholly from and as a necessary incident to interstate commerce are not property at the residence of the debtor.

While, as a matter of fact, we have shown that the determination of corporate excess was not based upon these credits, but upon a calculation and computation attempting to measure the value of the plaintiff's interstate commerce, it is submitted that even if the corporate excess tax be considered as in substance, as the State Court has suggested, a property tax on these credits, they are not taxable. This is true because they not only

have no taxable *situs*, but because they are not taxable *subjects*. Property may have a *situs* in the State and still be exempt from taxation. This is always the case where the property is the subject of interstate commerce. The fact that it is present in the States does not give the State jurisdiction to tax it if that property constitutes, at the time the tax is attempted to be imposed, interstate commerce. This involves the distinction between a tax upon interstate commerce and a tax upon an instrumentality used in interstate commerce.

It is well settled that a State cannot lay a direct tax upon interstate commerce and, also, that a tax upon a subject otherwise properly liable to the State's taxing jurisdiction is not necessarily bad because it has an indirect effect upon interstate commerce. In the latter case the question is one of degree, that is, applying the rule of substance, is the tax in reality a direct burden on interstate commerce?

The question as to whether a property tax upon credits arising in interstate commerce is an invalid restraint upon the commerce does not appear to have been directly passed upon by this Court. While the Court has avoided the declaration of a formula to test the general validity of State taxes under the commerce clause, the ratio *decidendi* of the cases indicates that, viewed as a property tax on credits, the tax here imposed is invalid.

A State *cannot* impose a property tax on tangibles temporarily present in the State as a part of interstate commerce.

Champlain Realty Co. v. *Town of Brattleboro*, 260 U. S., 366;
Hays v. *Pacific Mail SS Co.*, 17 How., 596.

A State *can* impose a property tax on tangibles present in the State, destined thereafter to move in interstate commerce.

Coe v. *Errol*, 116 U. S., 517.

A State *can* impose a property tax on tangibles present in the State, which have been brought there in interstate commerce, and which are destined thereafter to move in interstate commerce.

Bacon v. *Illinois*, 227 U. S., 504.

In the case of a property tax on tangibles then the test is clear. If the property is at the time the tax is imposed moving in interstate commerce, it is immune from State taxation, while if it is merged into the general mass of property in the State it can lawfully be taxed, although it has been in the past or will be in the future, moved in interstate commerce and therefore be at that time immune from taxation.

So a State *cannot* impose a sale or occupation tax on a contract for a sale and delivery across State lines.

Sonneborn Bros. v. *Cureton*, 262 U. S., 506, and cases cited at p. 515.

But a State *can* impose a sale or occupation tax on property which has previously been brought into the State in interstate commerce.

Sonneborn Bros. v. *Cureton (supra).*

And a State *can* impose an occupation tax on the production of property destined thereafter to move in interstate commerce.

Oliver Iron Mining Co. v. *Lord*, 262 U. S., 172.

It is apparent there is no magic in the distinction between a property tax and an excise tax. The test of validity is the same on excise taxes as on property taxes. If the excise directly affects interstate commerce it is void, while if it is upon something local which the State can regulate and control it does not infringe the com-

merce clause, although the privilege taxed may in turn have an affect upon interstate commerce.

It is apparent that in this connection interstate commerce consists essentially of three things: (1) the contract of sale, (2) the transportation of goods, (3) payment for the goods.

Without all of these the commerce cannot exist. A tax on the credits existing between the making of the sale and the payment is in substance a tax upon the contract because the contract is not executed until it has been performed by both parties. All contracts of sale are reciprocal and involve an obligation on each of the two parties. The seller agrees to ship the goods in interstate commerce, the buyer agrees to ship the money in interstate commerce. The entire transaction is single. A State can no more impose an excise tax on the paying for the goods than it can on selling or shipping them. It cannot impose a property tax on the credits arising from the sale under different conditions than on the tangible property sold.

There is in this respect no essential difference between a property tax on tangibles and one on intangibles. Neither can be taxed while they are a part of interstate commerce. Either can be taxed when they are a part of the general mass of property in the State, although they have previously been a part of interstate commerce. Tangibles may be taxed when the interstate commerce movement has ended and the goods are at rest. But the fact that the goods are at rest does not make them subject to taxation, if the interruption of movement was due to the exigencies of the commerce and was a mere incident thereto.

So, we submit, is also the rule as to intangibles. While the credit exists as a part of an uncompleted transaction in interstate commerce it is immune from State taxation as an essential part of the commerce itself. When, however, the seller collects the bill, the

money received whether held as specie or deposited as a credit in a bank becomes part of the general mass of property and is subject to tax. So perhaps if the seller accepts a negotiable instrument in *payment* of the debt, the debt evidenced thereby may cease to be a part of interstate commerce and may be merged as part of the general mass of property and become subject to property taxation.

In the case at bar there is no suggestion of any such conversion within the State of Massachusetts. It is agreed that the plaintiff does not keep the proceeds of its interstate sales within the State of Massachusetts. So far as Massachusetts is concerned the credits never lose their interstate character and never become a part of the mass of property in the State.

The distinction here drawn was made by this Court in *Burke* v. *Wells,* 208 U. S., 14. That case involved goods imported from abroad and sold in the original packages. Of course the immunity of such imports differs from that attaching to imports in interstate commerce. But the question there was as to whether the proceeds of sale had lost their identity so as to become merged into the general mass of property. There notes were received in payment for the goods, were not sent abroad, but were kept in New York. Money received in payment for the goods or of the notes was not sent abroad but was deposited in a bank account in New York and was used to pay the expenses of the New York business. Only the surplus proceeds were from time to time sent abroad.

The Court held that while the proceeds of the sale of the goods "were not directly taxable as such any more than the goods themselves," the notes and cash received in payment had been so dealt with by the owner as to become subject to taxation as other property.

But in the case at bar, we submit, the agreed statement of facts makes it clear that this is not so. Here

the regular course of business is payment direct by the customer to plaintiff in Pennsylvania. No bank account is kept in Massachusetts. Expenses are not paid from Massachusetts. No money is ever collected or paid in Massachusetts except in the case of delinquent accounts, and even then is immediately remitted intact to Pennsylvania.

In so far as credits may be assumed to arise in the conduct of plaintiff's interstate commerce business, these credits remain essentially a part of interstate commerce, and never lose their distinctive character as such and do not become a part of the general property in the State of Massachusetts nor subject to its taxation.

It is settled that a State tax on gross receipts in interstate commerce is invalid as in substance a tax on the commerce itself.

> *Crew Levick Co.* v. *Penn.*, 245 U. S., 292;
> *Phila. & Southern Steamship Co.* v. *Penn.*, 122 U. S., 326.

And the full force of this rule has not been limited by cases upholding a tax on property subject to the State's taxing jurisdiction measured by gross receipts, as in *Pullman Co.* v. *Richardson*, 261 U. S., 330. This is so, because when the State has jurisdiction over a taxable subject, the tax is not necessarily invalidated because measured by property which is not itself subject to tax.

> *Flint* v. *Stone Tracy Co.*, 220 U. S., 107.

But here the State seeks to uphold the tax on the ground that the credits, that is the gross receipts, are themselves subject to direct property taxation. We do not have here a tax in form on gross receipts, claimed to be in substance a tax on something else which is prop-

erly subject to tax, but instead there is here a tax in form a direct tax on interstate commerce claimed to be in substance a tax on credits arising from such interstate commerce.

We submit there is no legal distinction between a tax on property being transported in interstate commerce and a tax on the money paid by the purchaser for the goods purchased in interstate commerce. Nor is there any distinction between a tax on the value of the goods themselves, and on the credits arising from the sale of the goods, and on the gross receipts from the sale.

The reasons why a tax on gross receipts is a direct tax on the commerce were pointed out in *Phila. & Southern S. S. Co.* v. *Penn., supra.* And these reasons are directly applicable to show that a tax on credits arising from sales in interstate commerce is also a direct tax on the commerce. In that case the Court said:

> "If, then, the commerce carried on by the plaintiff in error in this case could not be constitutionally taxed by the state, could fares and freights received for transportation in carrying on that commerce be constitutionally taxed? If the state cannot tax the transportation, may it, nevertheless, tax the fares and freights received therefor? Where is the difference? Looking at the substance of things, and not at mere forms, it is very difficult to see any difference. The one thing seems to be tantamount to the other. It would seem to be rather metaphysics than plain logic for the state officials to say to the company, 'We will not tax you for the transportation you perform, but we will tax you for what you get for performing it.' Such a position can hardly be said to be based on a sound method of reasoning (p. 336) * * *.
>
> "Of what use would it be to the ship-owner, in carrying on interstate and foreign commerce, to have the right of transporting persons and goods

> free from state interference, if he has not the equal right to charge for such transportation without such interference? The principal object of his engaging in transportation is to receive pay for it. If the regulation of the transportation belongs to the power of Congress to regulate commerce, the regulation of fares and freights receivable for transportation must equally apply to that power; and any burdens imposed by the state on such receipts must be in conflict with it. To apply the language of Chief Justice Marshall, fares and freights for transportation in carrying on interstate or foreign commerce are as much essential ingredients of that commerce as transportation itself" (p. 338).

In *Crew Levick Co.* v. *Pennsylvania* (*supra*) the Court extended the same reasoning to apply to the gross receipts from the sales of a commercial business across State lines that it had previously applied to the Steamship Company directly engaged in the business of transportation. We submit that there is no distinction between the credits existing at any moment of time from sales in interstate commerce, and the gross receipts received over a period of time from sales in the same commerce. The gross receipts are merely the sum of the separate credits that arise. If the State can tax the credits individually, it can equally tax the gross receipts collectively. There is no difference in kind.

In *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, at page 290 this court said:

> "The Commerce Clause of the Constitution, Art. 1, Sec. 8, cl. 3, expressly commits to Congress and impliedly withholds from the several states the power to regulate commerce among the latter. Such commerce is not confined to transportation from one State to another, but comprehends all commercial intercourse between different states and all the component parts of that intercourse. Where goods in one state are transported into an-

other for purposes of sale the commerce does not end with the transportation, but embraces as well the sale of the goods after they reach their destination and while they are in the original packages. *Brown* v. *Maryland,* 12 Wheat, 419, 446-447; *American Steel & Wire Co.* v. *Speed,* 192 U. S. 500, 519. On the same principle, where goods are purchased in one State for transportation to another the commerce includes the purchase quite as much as it does the transportation. *American Express Co.* v. *Iowa,* 196 U. S. 133, 143. This has been recognized in many decisions construing the commerce clause. Thus it was said in *Welton* v. *Missouri,* 91 U. S. 275, 280; 'Commerce is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all its forms, including the transportation, purchase, sale, and exchange of commodities.' In *Kidd* v. *Pearson,* 128 U. S. 1, 20, it was tersely said: 'Buying and selling and the transportation incidental thereto constitute commerce.' In *United States* v. *E. C. Knight Co.,* 156 U. S. 1, 13, 'contracts to buy, sell, or exchange goods to be transported among the several states' were declared 'part of interstate trade or commerce.' And in *Addyston Pipe & Steel Co.* v. *United States,* 175 U. S. 211, 241, the court referred to the prior decisions as establishing that 'interstate commerce consists of intercourse and traffic between the citizens or inhabitants of different states, and includes not only the transportation of persons and property and the navigation of public waters for that purpose, but also the purchase, sale and exchange of commodities.' In no case has the court made any distinction between buying and selling or between buying for transportation to another State and transporting for sale in another state. Quite to the contrary, the import of the decisions has been that if the transportation was incidental to buying or selling it was not material whether it came first or last."

Champlain Realty Co. v. *Brattleboro* (*supra*), holds that the property itself is immune from taxation, and *Dahnke-Walker Milling Co.* v. *Bondurant,* gives a defi-

nition of interstate commerce sufficiently comprehensive to include in its immunity the credits derived from the sale as well as the actual contract of sale and the goods themselves.

Finally, after saying that a commerce of the volume of plaintiff's must have involved credits due from its customers, which would be subject to direct taxation by the State, the State Court, in Case 103, concluded:

> "This branch of the case seems to us to come within the scope of these words in *Shaffer* v. *Carter*, 252 U. S. 37, at 52, 'This is consonant with numerous decisions of this court sustaining State taxation of credits due to non-residents, *New Orleans* v. *Stemple*, 175 U. S. 309, 320 et seq., *Bristol* v. *Washington County*, 177 U. S. 133, 145; *Liverpool etc. Ins Co.* v. *Orleans Assessors*, 221 U. S., 346, 354; and sustaining federal taxation of the income of an alien non-resident derived from securities held in this country, *DeGanay* v. *Lederer* 250 U. S., 376.'" (Record #103, p. 26).

Of course, the main question in the *Shaffer* case was whether a State could impose an income tax on a non-resident, even though the source of the income was property or business within the State. The principle stated by Mr. Justice PITNEY immediately preceding the quotation was

> "And we deem it clear, upon principle as well as authority, that just as a State may impose general income taxes upon its own citizens and residents whose persons are subject to its control, it may, as a necessary consequence, levy a duty of like character, and not more onerous in its effect, upon incomes accruing to non-residents from their property or business within the State or their occupations carried on therein."

We have shown that the cases there cited do not sustain a State property tax on credits in interstate commerce.

Apparently, the State Court considered that this quotation from the *Shaffer* case justified its dictum that these credits were subject to direct taxation by the State as property having a *situs* therein. If this is a correct construction of this part of the Court's opinion, it is submitted that it is erroneous.

Assuming such credits in fact existed, they are immune from State taxation, because they are not instrumentalities used in interstate commerce, but the commerce itself.

Assuming that such credits exist in the case at bar, they exist as a part of interstate commerce. The State Court assumed them as normal and necessary incidents of interstate commerce. As such, their presence or *situs* in the State was a mere incident to such commerce. If under the stipulation they can be considered as existing at all, they are clearly immune from taxation.

The State Court's conclusion as to that part of the tax depending upon the value of the corporate excess seems, then, to be that while the tax is to be construed under the State law and the State constitution as a tax upon the privilege of maintaining an instrumentality of interstate commerce in the State, it can be sustained under the Federal Constitution as in substance a tax upon property within the State.

In so far as that conclusion rests upon the principle that this Court will look at the substance, and not at the form, plaintiff does not question it. But we submit that looking at substance and not at form, the tax here in question cannot be sustained as "no more than an ordinary tax on property." A tax at the rate of $5 a thousand is levied upon an assessed value of $84,001.21, making an annual tax of $420.01, upon the property of an agreed value of "about $500." The difference is sought to be explained by an assumption that direct receipts in interstate commerce constitute taxable property in the State. If this is to be considered as in substance a tax

on property, it is on the basis that gross receipts from interstate commerce derived from sales to residents of Massachusetts, are all considered as property within the State subject to the State's taxing jurisdiction. So far as this phase of the case is concerned, it is immaterial whether the tax be considered as an excise upon the doing of interstate commerce, or as a property tax upon the property the subject of interstate commerce. It is alike invalid as constituting a direct burden and restriction upon such commerce, which is beyond the power of the State.

The State Court further holds, in Case 103, as to the tax on corporate excess, that it is measured, in addition to its tangible property and credits from interstate commerce, by "its franchise", employed in Massachusetts. This part of the tax is then measured, in part, by the plaintiff's franchise to do an exclusively interstate commerce business. It is agreed that the only franchise used by the plaintiff in Massachusetts is the franchise of engaging in interstate commerce. The tax is in substance, as well as in form, upon the privilege of engaging in interstate commerce, and of maintaining as a means of conducting such commerce a place of business in Massachusetts. The cases relied upon by the State Court to sustain a tax on the franchise are not authorities for State taxation of the franchise or privilege of engaging in interstate commerce, but rather for State taxation of property subject to its taxing jurisdiction. They are quite inapposite to the facts in this case.

Thus, in *Western Union Tel. Co.* v. *Mass.*, 125 U.S. 530, the tax was sustained as in effect a tax on "account of property owned and used" in Massachusetts. But here it is stipulated that of the corporate excess assessment of $84,001.21, only $500 was property owned and used in Massachusetts. 99% of this part of the tax is not either in form or in effect a tax "on account of property owned and used" and taxable in Massachusetts.

So, also in *Pullman Car Co.* v. *Penn.*, 141 U. S., 18, the tax was sustained as a tax on property, the Court saying:

> "The tax * * * on account of its property within the State is in substance and effect a tax on that property."

Again, in *Pullman Co.* v. *Richardson*, 261 U. S. 330, the tax was sustained as a tax on property in the State, the Court saying:

> "The provisions under which the tax is imposed call it a property tax, specify the property subjected to it, and declare that it is in lieu of all other taxes on such property. The Supreme Court of the State holds it is a tax on the property specified. In no material respect does it differ from the tax which was recognized by this Court as a property tax in *United States Express Co.* v. *Minnesota*, and *Cudahy Packing Co.* v. *Minnesota*, above cited. * * * The tax is not claimed to be in excess of what would be legitimate as an ordinary tax on the property valued as part of a going concern."

In *Atlantic Etc. Tel. Co.* v. *Philadelphia*, 190 U. S., 160, the Court clearly distinguished that case from one such as is here under consideration, saying at page 164:

> "Neither was it a charge for the privilege of engaging in the business of interstate commerce, but it was one for the enforcement of local governmental supervision."

In that case the Court said it was for the jury to determine "whether the charge made by the city for supervision was reasonable or not", the supervision in question relating to electric wires strung in the city streets.

As to the State Court's quotation from this case, to the effect that a State may tax the franchise of a cor-

poration although that franchise is the business of interstate commerce, it is sufficient to say that although not so expressly stated, the rule was obviously limited to a domestic corporation created by the State, and over which it exercised personal jurisdiction, so that the privilege taxed was that of existing as a corporation, and not the doing of interstate commerce. The context clearly shows that the Court did not intend to hold that the franchise of engaging in interstate commerce was a subject which the State could tax. Thus, of the cases cited by this Court to sustain the rule as stated,—*Delaware Railroad Tax,* 18 Wall., 206, was a case of an ordinary tax on the right to exist as a corporation imposed upon a citizen and resident of the State. In *Postal Tel. Co.* v. *Adams,* 155 U. S., 688, 696, the Court said: "Doubtless no State could add to the taxation of property according to the rule of ordinary property taxation, the burden of a license or other tax on the privilege of using, constructing, or operating an instrumentality of interstate or international commerce, or for the carrying on of such commerce". In *Erie R.R. Co.* v. *Pennsylvania,* 158 U. S., 431, the tax was held to be an ordinary tax upon property in the State, and was specifically found not to be on the "occupation or business of carrying" on interstate commerce; *Central Pacific Co.* v. *California,* 162 U. S., 91, merely followed Delaware Railroad Tax (*supra*) in sustaining a tax levied by a State upon a corporation created under its laws. The fact that property otherwise taxable by a State was used as an instrumentality of interstate commerce was held not to give immunity from State taxation. In *Western Union Tel. Co.* v. *Taggart,* 163 U. S., 1, the tax was held to be merely an ordinary tax on property in the State, with no attempt to impose a tax on the franchise of doing interstate commerce. In *Western Union Tel. Co.* v. *Gottlieb,* 190 U. S., 412, the tax was sustained as one on property in the State and

not as on the franchise of engaging in interstate commerce.

In *U. S. Express Co.* v. *Minnesota,* 223 U. S., 335, the tax was sustained upon the authority of *Postal Tel. Co.* v. *Adams, (supra),* and the finding that it amounted to "no more than an ordinary tax on property". The Court said at page 346:

> "The Supreme Court of Minnesota construed the tax to be a property tax * * *. While the determination that the tax is a property tax measured by gross receipts is not binding upon this Court, we are not prepared to say that this conclusion is not well founded in view of the provisions and purposes of the law."

We submit that none of the cases cited are authority for holding that the franchise of a foreign corporation exclusively engaged in interstate commerce constitutes property in the State of Massachusetts.

If the part of the tax measured by corporate excess can be considered as a tax on property, it can only be a tax on property the subject of interstate commerce and immune from State taxation. So construed, the tax is, we submit, invalid because in conflict with the commerce clause.

(b) It is in conflict with the XIV Amendment.

Again, the tax, if considered as a property tax, is invalid because imposed upon property outside the State, and is therefore in contravention of the Fourteenth Amendment to the Constitution of the United States. The contention that the method of allocating the value of the plaintiff's business in the Commonwealth, as calculated by the Commissioner of Taxation, and sustained by the State Court, included property wholly outside of the Commonwealth in violation of the Fourteenth Amendment to the Federal Constitution does not relate

to any differences in values, or to the arithmetical calculation of the amount of the tax, but concerns the construction and constitutionality of the statute. This contention involves a consideration of the facts.

The excise, in so far as the portion measured by income is concerned, is determined by a combination of three percentages: (1) percentage of tangible assets in Massachusetts to all tangible assets; (2) percentage of wages, etc., assignable to Massachusetts to total wages; (3) percentage of receipts assignable to Massachusetts to gross receipts from all business; these percentages being applied to the petitioner's total net income.

In arriving at these percentages, the Commissioner in Case 103 deducted $4,500,000 from the total tangible assets returned by the petitioner, and added $6,756.40 to wages assignable to Massachusetts returned by petitioner, thereby considerably increasing the proportion of the petitioner's net income to be allocated to Massachusetts.

The $4,500,000 item represents the value of the petitioner's plant at Martin's Creek, Pennsylvania, its principal mill. Title to this mill is held by a Pennsylvania corporation, the stock of which is entirely owned by petitioner, title being held in this way because of the restriction in Pennsylvania regarding foreign corporations holding real estate. The subsidiary company simply holds title, and the plaintiff operates the mills, receives all the income therefrom, and pays all expenses, merely crediting the Pennsylvania Company with a nominal rental sufficient to cover depreciation (Case #103, p. 10).

The net result is that all the earnings of this important plant appear in petitioner's net income, upon which this excise is measured. In allocating the portion of such net income applicable to Massachusetts by a comparison of tangibles within and without that Commonwealth, an obviously false and misleading figure is reached if there is to be omitted in calculating the per-

centage the $4,500,000 property outside of Massachusetts, which produces a portion of the income; and since the determination of corporate excess and of assets in Massachusetts is based upon the percentage of income apportioned to Massachusetts, the error in the inclusion of this Pennsylvania Company stock as an intangible is doubled. That is, through treating this stock as an intangible, the income percentage used as a multiplier is increased, and the multiplicand is also increased, so that if the tax on corporate excess is considered as a property tax, to a substantial extent it is a tax on the stock of the Pennsylvania corporation, none of which can on any basis be given a *situs* in Massachusetts.

So considered, this exact question was raised under the New York Corporation Tax Act, which resembles this portion of the Massachusetts excise to the extent that it is based on a proportion of the entire net income allocated to New York by a comparison of total assets to New York assets.

The New York Court of Appeals in *People ex rel. Alpha Portland Cement Co.* v. *Knapp,* 230 N. Y., 48, held that an assessment ignoring the value of this Pennsylvania plant, and at the same time including the income therefrom, taxed property not within the State's jurisdiction, and was *pro tanto* unconstitutional. A rehearing was denied (231 N. Y., 516), and this Court denied a petition for a writ of certiorari (256 U. S., 702).

While in Case 327 the Department inadvertently included the $4,500,000 Pennsylvania Company stock as a tangible asset in calculating the income tax, it treated this asset as an intangible in assessing corporate excess in this case as in Case 103. In both cases, more than half of the assets assigned to Massachusetts for computing corporate excess consisted of a portion of the value of this Pennsylvania stock.

The Massachusetts State Court held that the New York decision was not applicable, apparently upon the ground that while the New York tax was in substance a

tax on property, the Massachusetts tax was not. Of course, this is what we contend, that this tax is not in substance a tax on property, but is both in substance and in form a tax on interstate commerce. If, however, the tax is in substance a tax on property, then we submit that the inclusion in the property taxed of a portion of the value of the Pennsylvania mills constitutes a violation of the Fourteenth Amendment as a taxing of property beyond the State's jurisdiction.

Wallace v. *Hines*, 253 U. S., 66, involved a North Dakota statute measuring a tax on an interstate railroad by assessing the value of its property in the State at that proportion of the total value of its stocks and bonds that the main-track mileage within the State bore to the entire line. This Court held this indefensible where it was shown that the cost of construction per mile was low in North Dakota, and that the great terminals were elsewhere.

The Court said:

> "The only reason for allowing a State to look beyond its borders when it taxes the property of foreign corporations is that it may get the true value of the things within it, when they are part of an organic system of wide extent, that gives them a value above what they otherwise would possess. The purpose is not to expose the heel of the system to a mortal dart—not, in other words, to open to taxation what is not within the State. Therefore, no property of such an interstate road situated elsewhere can be taken into account unless it can be seen in some plain and fairly intelligible way that it adds to the value of the road and the rights exercised in the State. Hence, the possession of bonds secured by mortgage of lands in other States, or of a land-grant in another State or of other property that adds to the riches of the corporation but does not affect the North Dakota part of the road is no sufficient ground for the increase of the tax—whatever it may be—whether a tax on property or, as here, an excise upon do-

> ing business in the State. *St. Louis, Southwestern Ry. Co.* v. *Arkansas,* 235 U. S., 350, 364. In this case, it is alleged, the tax commissioner's valuation included items of the kind described to very large amounts. The foregoing considerations justify the preliminary injunction that was granted against what would appear to be an unwarranted interference with interstate commerce and a taking of property without due process of law. *Fargo* v. *Hart,* 193 U. S., 490; *Union Tank Line Co.* v. *Wright,* 249 U. S., 275, 282" (pp. 69, 70).

The same principle (although in this case of small practical moment) applies to the question of increasing the wages allocated to Massachusetts. The facts are that the salesmen who report to the Boston office of the petitioner sell all over New England (Case #103, pp. 10, 18). The plaintiff in its return in Case 103 gave the total paid these salesmen as $17,780, but only allocated to Massachusetts that proportion of these wages which Massachusetts sales bore to other New England sales. The State Court ruled that the gross wages must all be allocated to Massachusetts. Here again the net income of the plaintiff apportioned to Massachusetts is enlarged by New England sales outside of Massachusetts. As far as corporate excess is concerned, the excise is based on the ratio of assets, tangible and intangible, employed in Massachusetts to all the assets of the corporation. The plaintiff stated in its return that the value of its tangible property in Massachusetts was $573 (the office furniture of its sales office), and that it has no intangible property in the Commonwealth. The State accepted the statement as to tangible property, but valued the plaintiff's intangibles in Massachusetts at $114,838. This result was obtained by taking that proportion of the total value of the plaintiff's intangible properties which the plaintiff's income allocated to Massachusetts, under the calculation above, bore to the plaintiff's total income.

But, as shown above, the income allocation to Massachusetts was based on a calculation which ignored assets outside the State, but included income from such assets, and also by considering as Massachusetts expenses the salaries of salesmen operating elsewhere. This arbitrarily enlarged the income attributable to Massachusetts.

It follows that, if the allocation of income to Massachusetts was arbitrary and not in accordance with the true situation, this calculation of intangibles in Massachusetts based on such income to determine corporate excess is also arbitrary and false.

In *Oklahoma* v. *Wells Fargo & Co.*, 223 U. S., 298, this Court said:

> "For, to recur to the statute, it is not simply a tax on all gross receipts within the state, which possibly might be read as intended to reach such receipts as it could, even if less than all, *Ratterman* v. *Western Union Telegraph Co.*, 127 U. S., 411, it is a tax on a proportion of total gross receipts a considerable part of which, as we have explained, the state has no right to tax. Neither the court below nor this court can reshape the statute simply because it embraces elements that it might have reached if it had been drawn with a different measure and intent."

In that case, the Court having found that the statute included a tax upon property without the State, and therefore beyond the State's jurisdiction, held the entire law invalid.

We submit that if the tax be considered as in substance one on property, other than property immune from taxation as constituting interstate commerce, it is invalid because imposed upon property outside the State and not subject to the State's jurisdiction.

POINT VI.

The part of the tax measured by net income is invalid because the subject taxed is not one which the State has jurisdiction to tax.

As to the portion of the tax measured by net income, the State Court finds in Case 103, it is "dependent upon net profits derived solely from interstate commerce." After quoting from a number of decisions of this Court, the State Court held that the constitutionality of this part of the Act was sustained by them, saying:

> "The principles there declared, as we understand them, support the validity of the tax act here involved" (Case #103, p. 29).

What these principles were was not stated by the State Court. The admitted fact is that a tax has been sustained measured by the net income received by a non-resident, whom the State has no personal jurisdiction to tax, derived exclusively from a source which the State has no constitutional power to tax. Certainly, none of the cases cited, and no other case ever determined by this Court, declare a principle that would support such a tax. Referring to the cases relied upon by the State Court:

In *Yale & Towne Mfg. Co.* v. *Travis,* 252 U. S., 60, it was held that non-resident natural persons could be taxed on such part of their net income as was derived from their personal service in the State. The State had full jurisdiction to tax the source of the income, *i. e.,* the business or occupation in the State; and it was accordingly held that it could tax the fruit as well as the tree. The tax was sustained because the State had power to tax the source from which the income was derived.

In *Peck* v. *Lowe,* 247 U. S., 165, a Federal income tax upon a citizen and resident of the United States was

sustained. It was held that the tax was not invalid because a portion of the income was derived from the business of export. This was so because the tax was considered not to be a tax upon the source of the income, but a personal tax upon the taxpayer over whom the Government had full personal jurisdiction.

In *U. S. Glue Co.* v. *Oak Creek,* 247 U. S., 321, a tax levied by a State upon a domestic corporation measured by its entire net income, a portion of which was derived from interstate commerce, was sustained upon the authority of *Peck* v. *Lowe.* The tax was considered to be not a tax upon the source of the income, but a personal tax upon the taxpayer, over whom the State had full personal jurisdiction. The decision was expressly limited to "persons and corporations otherwise subject to the jurisdiction of the State."

In *Shaffer* v. *Carter,* 252 U. S., 37, a tax on the income of a non-resident derived from the conduct of an oil business in the State was sustained. Here the State had no personal jurisdiction over the taxpayer, but there was a large amount of property permanently in the State, and used in the business of producing oil therein. The State could tax the property and the business conducted therein, and this was in fact the source of the income taxed, which was held to be the fruit of the tree over which the State had full jurisdiction. It was contended in that case that the income was derived from interstate commerce. Shaffer owned and operated oil wells, and shipped the oil out of the State. The State had jurisdiction to tax the oil wells as property, and to tax the business of producing the oil. It had, therefore, jurisdiction over a taxable subject. The tax was not unreasonable in amount, and was in substance not more than a reasonable tax on a subject over which the State had full jurisdiction. The fact that the tax was measured by net income, which was in part derived from interstate commerce, was held not to invalidate the tax.

In *Underwood Typewriter Co.* v. *Chamberlain,* 254 U. S., 113, the plaintiff owned and operated a factory in Connecticut, from which it shipped goods in interstate commerce. A tax upon a portion of its net income was sustained upon the ground that it was in substance a tax upon property in the State, which was subject to the State's jurisdiction to tax. The Court expressly limited its decision to the facts in that case, which showed that the tax viewed as an ordinary property tax was not unreasonable.

In *Hump Hairpin Co.* v. *Emmerson,* 258 U. S., 290, the plaintiff had its factory and entire business in Illinois. The tax was sustained as in substance one on property subject to the State's jurisdiction.

We submit that the principle declared in these cases is that where there is jurisdiction over the subject taxed, and the tax is a reasonable one on this subject, it is not invalidated because it is measured by net income which is derived in part from a source which is not itself a subject of taxation.

It has not been held:

(1) That a tax is valid when levied with complete absence of jurisdiction over the subject taxed, because it is measured by net income.

(2) That the fact that a tax is measured by net income gives a State the power to tax the subject of interstate commerce.

(3) That jurisdiction over the subject taxed is not as essential in the case of a tax measured by net income, as in the case of a tax measured in any other way.

It has not been held that when the entire income is derived from interstate commerce, a State tax measured thereby upon a subject which the State has jurisdiction to tax is valid, although the ratio *decidendi* of the above cases would perhaps imply that this may be so. But that question is not involved in this case. The plaintiff's

contention is that the measure of the tax is immaterial because of entire absence of jurisdiction over the subject taxed. Concededly, there is no jurisdiction to tax the non-resident personally, and there is no jurisdiction to tax interstate commerce which the Court finds is the sole source of the income. Where, then, is the taxable subject? Clearly, it cannot be considered as equivalent to a tax on property, because of the State Court's finding that it is not, because of the provisions of the statute itself, and because of the gross disproportion between the amount of the tax and the value of property in the State.

The State Court, it is respectfully submitted, has confused the distinction between the subject of a tax and the measure of a tax.

It has been held that where a State has jurisdiction of the subject, a tax is not invalidated because it is measured by property not itself directly subject to tax, and also that where a tax is measured by and is in substance a tax on property subject to tax, it is not necessarily invalid because expressed to be a tax on a subject itself immune from taxation.

But this merely means that, looking through form to substance, the tax in each case was sustained because the State had jurisdiction to levy a tax upon the subject taxed.

That a tax on A., measured in a certain way, is valid, does not imply that a tax on B. measured in the same way is also valid, unless it is assumed that A. and B. are similarly situated with respect to the State's jurisdiction to tax. Thus, a State may tax its own residents upon their entire income from whatever source obtained, because it has personal jurisdiction over the taxpayer, and can treat the income tax as a personal tax on him. But it can only tax the non-resident on income derived from sources within the State, because while it has juris-

diction over the source of this part of the taxpayer's income, it has no personal jurisdiction over him.

For this reason the cases relied upon by the State Court are inapplicable. In the *United States Glue Company* case, the tax was on a domestic corporation; and the court held that a tax measured by net income, a portion of which was derived from interstate commerce, was valid. Here, the State had full personal jurisdiction over the subject taxed.

On the other hand, in *Shaffer* v. *Carter*, the tax was on a non-resident, measured by his net income from sources within the State. Here, the State had jurisdiction over the source of the income, which was in substance what was taxed. Obviously, the decision in the *American Glue Co.* case cannot be cited as holding that income from sources without the State could have been taxed in *Shaffer* v. *Carter*.

So, in *Hawley* v. *Malden*, 232 U. S., 1, it was held that Connecticut could tax its own citizens upon personal property owned by them and having a *situs* without its borders. But this could not be cited as authorizing a tax on a non-resident on property situated outside the State, as in *Oklahoma* v. *Wells, Fargo & Co.*, 223 U. S., 298.

The State Court argues that since a tax on the entire net income of a resident, a portion of which comes from interstate commerce, is valid, therefore a tax on so much of the income of a non-resident as is derived from interstate commerce is also valid. This, we submit, is a *non-sequitur*, and results from a failure to distinguish what is the subject taxed. In every case in which an income tax has been sustained, there has been jurisdiction over the subject taxed, either (1) personal, over the taxpayer, or (2) *in rem*, over the source of the income. Here, concededly, there is no personal jurisdiction over the taxpayer; concededly the sole source of the income is in-

terstate commerce; concededly the State has no jurisdiction to tax this interstate commerce. We submit that the total absence of jurisdiction over the subject taxed puts this case in an entirely different class from the cases relied upon by the State Court, in all of which jurisdiction over the subject taxed was clear.

None of these cases cited by the State Court announce a principle which tends to sustain the tax here in question. In all of them the taxing power had unquestioned jurisdiction to tax the subject matter, and it was held that the tax was not invalidated because the measure of the tax included matters which, considered as the direct subject of taxation, could not have been taxed. The distinction between the subject of the tax and the measure of the tax was pointed out in *Flint* v. *Stone Tracy Co.*, 220 U. S., 107, where, at pages 163 and 165, the Court said:

> "There is nothing in these cases contrary, as we shall have occasion to see, to the former rulings of this court which hold that where a tax is lawfully imposed upon the exercise of privileges within the taxing power of the State or Nation, the measure of such tax may be the income from the property of the corporation, although a part of such income is derived from property in itself non-taxable. The distinction lies between the attempt to tax the property as such and to measure a legitimate tax upon the privileges involved in the use of such property. * * * It is, therefore, well settled by the decisions of this court that when the sovereign authority has exercised the right to tax a legitimate subject of taxation as an exercise of a franchise or privilege, it is no objection that the measure of taxation is found in the income produced in part from property which of itself considered is non-taxable."

Of course, if this tax could fairly be considered as a tax on income from property within the State, a differ-

ent question would arise. It is established that a State can tax as property the instrumentalities of interstate commerce having a *situs* within its borders, and that a State having jurisdiction of the subject, can lay a tax measured by net income, *a portion* of which is derived from interstate commerce. While it has not been held that a State having jurisdiction over the subject, can lay a tax measured by net income, *all* of which is derived from interstate commerce, it may be that if the tax here in question could be construed as a tax measured by income derived from property in the State which was subject to the State's taxing jurisdiction, it would be valid, although that income was derived entirely through the use of property in interstate commerce.

Plaintiff concedes that the State of Massachusetts can lawfully impose a tax upon the $500 worth of property that it has in the State of Massachusetts. It recognizes that the fact that this property is an instrumentality used in interstate commerce does not render it immune from ordinary property taxation. It may be that as the State has power to tax the property used in interstate commerce, it can tax the income derived from the use of that property, provided the tax is limited to income bearing a reasonable relation to the value of the property, so that it can be considered as in substance a tax upon the property, and not upon the business of interstate commerce. This question has not been squarely decided, and is not presented for decision in this case, because it is clear that this tax is not imposed on the income from the property in Massachusetts in such a way as to constitute in substance a tax upon that property. If the income subject to the tax of two and a half per cent. were apportioned entirely upon the relation that the property in Massachusetts, stipulated to be of the value of $500, bears to the total property of the plaintiff, or even to its total tangible property, it may be that this part of the tax could be construed as in substance a tax on property

in the State. We have shown above that this would apportion to the State of Massachusetts, according to the plaintiff's contention, $18 of income, and according to the State's finding, $30 of income. A tax of two and a half per cent. on this thirty dollars would not be an unreasonable tax, and might be sustained as in substance a tax upon the property, used in interstate commerce it is true, but still property in the State and subject to the State's taxing jurisdiction. But we submit that it is clear that this tax, which apportions total income of $15,370 from $500 worth of property, and imposes an income tax of $380, purporting to be upon the income derived from $500 worth of property, when it is conceded that the actual net income of the corporation amounted to only about five per cent. on its total property, is not and cannot be held in substance to be a tax upon the property or upon the income from the property. It is in fact and in substance as well as in form and measure a tax on interstate commerce, and therefore invalid.

POINT VII.

It is submitted that the judgments of the Supreme Judicial Court of Massachusetts should be reversed.

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APPENDIX.

The present Massachusetts Tax Act here in question is printed in the Record (Case 103, pp. 31-40), and the applicable parts *supra*, pp. 2-5. The present Act superseded the Act of 1909, which had superseded the 1903 Act. In so far as they affected foreign corporations, the Acts of 1909 and 1903 are as follows:

(a) Acts of 1909, Part III, Chapter 490.

"Section 54. Every foreign corporation shall annually, within thirty days after the date fixed for its annual meeting, or within thirty days after the final adjournment of said meeting, but not more than three months after the date so fixed for said meeting, prepare and file in the office of the Secretary of the Commonwealth, upon payment of the fee provided in Section 91 of Chapter 437 of the acts of the year 1903, a certificate signed and sworn to by its president, treasurer and by a majority of its board of directors, showing the amount of its authorized capital stock, and its assets and liabilities as of a date not more than 90 days prior to said annual meeting, in such form as is required of domestic business corporations under the provisions of section 45 of said chapter, and the change or changes, if any, in the other particulars included in the certificate required by section 60 of said chapter, made since the filing of said certificate or of the last annual report.

"Section 55. A certificate which is required to be filed by the preceding section shall be accompanied by a written statement under oath by an auditor, as provided in Section 47 of chapter 437 of the acts of 1903, except that such auditor shall in all cases be chosen by the board of directors. Before it is filed it shall be submitted to the commissioner of corporations who shall examine said certificate and shall as tax commissioner assess upon the corporation an excise tax in accord-

ance with the provisions of the following section. If he finds that the certificate is in compliance with the requirements of the preceding section, he shall indorse his approval thereon; but no certificate shall be filed until he has indorsed his approval thereon, and until the excise tax required by the following section has been paid to the treasurer and receiver general.

"Section 56. Every foreign corporation shall, in each year, at the time of filing its annual certificate of condition, pay to the treasurer and receiver general, for the use of the Commonwealth, an excise tax to be assessed by the tax commissioner of one fiftieth of one per cent of the par value of its authorized capital stock as stated in its annual certificate of condition; but the amount of such excise tax shall not in any one year exceed the sum of $2,000."

(b) Acts of 1914, Chapter 724, Section 1.

"Every foreign corporation subject to the tax imposed by section fifty-six of Part III of chapter four hundred and ninety of the acts of the year nineteen hundred and nine shall in each year, at the time of filing its annual certificate of condition, pay to the treasurer and receiver general, for the use of the commonwealth, in addition to the tax imposed by said section fifty-six, an excise tax to be assessed by the tax commissioner of one one hundredth of one per cent of the par value of its authorized capital stock in excess of ten million dollars as stated in its annual certificate of condition."

(c) Acts of 1903, Chap. 437, Sec. 75.

"Every foreign corporation of the classes described in Section fifty-eight shall, in each year, at the time of filing its annual certificate of condition, pay to the treasurer and receiver general, for the use of the Commonwealth, an excise tax to be assessed by the Tax Commissioner of one hundredth of one per cent of the par value of its au-

thorized capital stock as stated in its annual certificate of condition; but it may deduct from such tax the amount of taxes upon property paid by it to any city or town in the Commonwealth during the preceding year; but the amount of such excise tax shall not in any one year exceed the sum of two thousand dollars."

The foregoing section was amended by Acts of 1907, Chapter 578, to read as follows:

"Every foreign corporation of the classes described in section fifty-eight shall, in each year, at the time of filing its annual certificate of condition, pay to the treasurer and receiver general, for the use of the Commonwealth, an excise tax to be assessed by the tax commissioner of one-fiftieth of one per cent of the par value of its authorized capital stock as stated in its annual certificate of condition; but the amount of such excise tax shall not in any one year exceed the sum of two thousand dollars."